Supreme Court, U.S.
FILED
011875 JUN 19 2002
OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

GUARD PUBLISHING COMPANY, d/b/a
The Register- Guard,

Petitioners,

v.

RAYMOND D. WILLIAMS, Acting Regional Director
of the Nineteenth Region of the National Labor Relations Board,
for and on behalf of the National Labor Relations Board,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

L. Michael Zinser
Counsel of Record
Glenn E. Plosa
THE ZINSER LAW FIRM, P.C.
150 Second Avenue North
Suite 410
Nashville, Tennessee 37201
Telephone: 615.244.9700
Facsimile: 615.244.9734
Attorneys for Petitioners

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCINFO.COM

QUESTIONS PRESENTED FOR REVIEW

1. Should an injunction issue, pursuant to Section 10(j) of the National Labor Relations Act, 29 U.S.C. §160(j), sought on a category II *Gissel* bargaining order theory, where no representation certification petition was filed with the National Labor Relations Board, the union did not obtain majority support, the union obtained no union authorization cards, no offer of proof of majority support was made on the employer, and no National Labor Relations Board-conducted, secret-ballot election was held?

2. What is the appropriate standard to employ when determining the propriety of an injunction pursuant to Section 10(j) of the National Labor Relations Act?

3. What powers do federal courts have to grant or withhold equitable relief for alleged violations of the National Labor Relations Act, and are traditional National Labor Relations Board remedies sufficient to rectify any alleged violations of the National Labor Relations Act?

4. How much deference should be granted to the recommendation of an Administrative Law Judge when evaluating the propriety of a 10(j) injunction?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties are:

Petitioners: Guard Publishing Co. d/b/a The Register-Guard (*"The Register-Guard"*), a nongovernmental party to the proceedings before the United States District Court for the District of Oregon, and the United States Court of Appeals for the Ninth Circuit.

The Register-Guard here discloses that it is a privately held Oregon corporation, that there are no parent corporations to *The Register-Guard*, and there are no publicly held companies that own ten per cent or more of *The Register-Guard's* stock.

Respondent: Raymond D. Willms was the Acting Regional Director of Region Nineteen of the National Labor Relations Board at the time this action commenced. Willms brought this action by and on behalf of the National Labor Relations Board

The National Labor Relations Board ("NLRB" or "the Board"), is a government agency whose primary function is to administer the National Labor Relations Act ("NLRA").

The General Counsel is the independent counsel for the NLRB that is lead counsel for all legal proceedings aside from proceedings before this Honorable Court.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

RELEVANT PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

CONCLUSION 27

APPENDIX

CIRCUIT COURT ORDER (8/19/01) 1a

CIRCUIT COURT ORDER (1/10/02) 2a

DISTRICT COURT ORDER (5/1/01) 6a

NATIONAL LABOR RELATION BOARD ORDER 16a

ORDER DENYING REHEARING 53a

ORDER DENYING STAY 54a

TABLE OF AUTHORITIES

FEDERAL CASES

ANGLE V. SACKS, 382 F.2D 655, 659-61 (10TH CIR. 1967)..... 19
ARLOOK V. S. LICHTENBERG & COMPANY, INC., 952 F.2D 367 (11TH CIR. 1992) 15
AVECOR, INC. V. NLRB, 931 F.2D 924, 938 (D.C. CIR. 1991) ... 12, 13
BE-LO STORES V. NLRB, 126 F.3D 268 (4TH CIR. 1997) 12, 13
CHARLOTTE AMPHITHEATER CORP. V. NLRB, 82 F.3D 1074 (D.C. CIR. 1996) 13, 14
COMMUNITY ACTION, INC., 172 F.3D 1034, 1040 (8TH CIR. 2000) 9, 19, 21
CONAIR CORP. V. NLRB, 721 F.2D 1355, 1380-81 (D.C. CIR. 1983) 25, 26
CUMBERLAND SHOE CORP., 144 NLRB 1268 (1963) 17
D'AMICO V. UNITED STATES SERV. INDUS., INC., 867 F.SUPP. 1075 (D.D.C. 1994) 19, 21
DOUGLAS FOODS CORP. V. NLRB, 251 F.3D 1056 (D.C. CIR. 2001) 12, 13
FLAMINGO HILTON-LAUGHLIN V. NLRB, 148 F.3D 1166 (D.C. CIR. 1998) 12
FUCHS V. STEEL FAB INC., 356 F.SUPP. 385, 387-88 (D. MASS. 1973) 9
GARDNER MECHANICAL SERVICES, INC. V. NLRB, 115 F.3D 636, 643 (9TH CIR. 1997) 12
HARPERCOLLINS SAN FRANCISCO V. NLRB, 79 F.3D 1324, 1332 (2ND CIR. 1996) 14
HIRSCH V. DORSEY TRAILERS, INC., 147 F.3D 243, 247 (3RD CIR. 1998) 19
IMPACT INDUSTRIES, INC. V. NLRB, 847 F.2D 379, 383 (7TH CIR. 1988) 13
INT'L LADIES' GARMENT WORKERS' UNION V. NLRB, 366 U.S. 731, 737, 81 S. CT. 1603, 1607, 6 L. ED. 2D 762 (1961) 25
J. J. NEWBERRY CO. V. NLRB, 645 F.2D 148, 154 (2ND CIR. 1981) 24
J.L.M. INC. V. NLRB, 31 F.3D 79 (2ND CIR. 1994)..... 13
JOY SILK MILLS, INC., 185 F.2D 732, (D.C. CIR. 1950), CERT. DENIED, 341 U.S. 914, 71 S. CT. 734, 95 L. ED. 1350 (1951). 10

KINNEY DRUGS, INC., V. NLRB, 74 F.3D 1419 (2ND CIR. 1996)..13
KINNEY V. PIONEER PRESS, 881 F.2D 485, 493 (7TH CIR. 1989) 19, 21
LEVITZ FURNITURE COMPANY, 323 NLRB NO. 105 (2001).....11
LICHTENBERG & COMPANY, INC., 952 F.2D 367 (11TH CIR. 1992)15
MILLER V. CALIFORNIA PAC. MED. CTR., 19 F.3D 449, 459-60 (9TH CIR. 1994) (EN BANC).....7, 16, 19, 21, 22, 23
MONTGOMERY WARD & CO. V. NLRB, 904 F.2D 1156 (7TH CIR. 1990).....13
NLRB V. CHATFIELD ANDERSON CO., 606 F. 2D 266, 268 (9TH CIR. 1979).....9, 12
NLRB V. ED CHANDLER FORD, INC., 718 F.2D 892 (9TH CIR. 1983).....18
NLRB V. ELECTRO-VOICE, INC., 83 F.3D 1559, 1566-67 (7TH CIR. 1996), CERT DENIED, 519 U.S. 1055, 117 S. CT. 683, 136 L. ED. 2D 608 (1997).....19
NLRB V. GISSEL PACKING CO., INC., 395 U.S. 575, 89 S. CT. 1918 (1940) ..... PASSIM
NLRB V. GRUBER'S SUPERMARKET, INC., 501 F.2D 697 (7TH CIR. 1974).....23
NLRB V. PACIFIC SOUTHWEST AIRLINES, 550 F.2D 1148 (9TH CIR. 1977) 12
NLRB V. PENINSULA ASS'N FOR RETARDED CHILDREN AND ADULTS, 627 F.2D 202 (9TH CIR. 1980).....12
NLRB V. RANDALL P. KANE, INC., 581 F.2D 215 (9TH CIR. 1978) 18
NLRB V. REMINGTON RAND, INC., 94 F. 2D 862, 868 (2ND CIR.), CERT. DENIED, 304 U.S. 576, 58 S. CT. 1046, 82 L. ED. 1540 (1938) 10
NLRB V. SOUTH BAY DAILY BREEZE, 415 F.2D 360 (9TH CIR. 1969), CERT. DENIED, 397 U.S. 915 (1970) 18
NLRB V. TAYLOR MACHINE PRODUCTS, INC., 136 F.3D 507 (6TH CIR. 1998).....12, 14
NLRB V. WESTERN DRUG, 600 F.2D 1324 (9TH CIR. 1979).....12
ONA CORP. V. NLRB, 729 F.2D 713, 723-24 (11TH CIR. 1984) ...16
P.H.NURSING HOME, INC., 332 (2000).....15
PORTER V. WARNER HOLDING CO., 328 U.S. 395, 398, 66 S. CT. 1086, 1089, 90 L. ED. 1332 (1946) 21
REL. NLRB V. PILOT FREIGHT CARRIERS, INC., 515 F.2D 1185, 1194 (5TH CIR. 1975) 9, 16

REL. NLRB V. PILOT FREIGHT CARRIERS, INC., 515 F.2D 1185, 1194 (5TH CIR. 1975) 9, 16
SAN FRANCISCO-OAKLAND NEWSPAPER GUILD, ET. AL. V. KENNEDY, 412 F.2D 541, FN 1 (9TH CIR. 1969) 16
SCHAUB V. DETROIT NEWSPAPER AGENCY, 154 F.3D 276, 278-79 (6TH CIR. 1998) 19
SCOTT V. STEPHEN DUNN & ASSOCIATES, 241 F.3D 652 (9TH CIR. 2001) ..... PASSIM
SKYLINE DISTRIBUTORS V. NRLB, 99 F.3D 403 (D.C. CIR. 1996) 13, 23, 25
SLATER V. DENVER BUILDING AND CONSTRUCTION TRADES COUNCIL, 175 F.2D 608 (10TH CIR. 1949) 16
SOMERSET WELDING & STEEL, INC. V. NLRB, 987 F.2D 777, 781 (D.C. CIR. 1993) 13
ST. AGNES MEDICAL CENTER V. NLRB, 871 F.2D 137 (D.C. CIR. 1989) 13
SZABO V. P*I*E NATIONWIDE, INC., 878 F.2D 207, 209 (7TH CIR. 1989) 9
WEINBERGER V. ROMERO-BARCELO, 456 U.S. 305, 313, 102 S. CT. 1798, 1803-04, 72 L. ED. 2D 91 (1982) 21, 22, 25

FEDERAL STATUTES

28 U.S.C. §§1253 2
28 U.S.C. §§1291 2
29 U.S.C. §151 2
29 U.S.C. §158(C) 11
29 U.S.C. §159(A) 26
29 U.S.C. 159(C) 11
29 U.S.C. §159(C)(1) 8
29 U.S.C. §160(J) 1, 2
29 U.S.C. 160(L) 20

FEDERAL RULES

FED. R. EVID. 901 6

FEDERAL REGULATIONS

29 C.F.R. §102.60 (2001) 11
29 C.F.R. §102.63 (2001) 11
29 C.F.R. §102.64 (2001) 11

OTHER AUTHORITIES

SUPREME COURT'S GISSEL DECISION, 79 N.W.U.L. REV. 87 115-17, 139-40 (1984).....24
REPRESENTATION ELECTIONS UNDER THE NATIONAL LABOR RELATIONS ACT, 78 HARV. L. REV. 38, 40 (1964).....24

IN THE
SUPREME COURT OF THE UNITED STATES

GUARD PUBLISHING CO., D/B/A *THE REGISTER-GUARD*,
Petitioners,

V.

RAYMOND D. WILLMS,
ACTING REGIONAL DIRECTOR
NINETEENTH REGION
NATIONAL LABOR RELATIONS BOARD
FOR AND ON BEHALF OF THE
NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE REGISTER-GUARD, Petitioner, by undersigned counsel, under appropriate rules of this Court, request that this court issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The instant dispute arises from an injunction granted pursuant to Section 10(j) of the NLRA, 29 U.S.C. §160(j), by the District Court of Oregon on May 1, 2001. The United States Court of Appeals for the Ninth Circuit affirmed the order on January 10, 2002. The Ninth Circuit denied *The Register-Guard's* petition for rehearing *en banc* on March 21, 2002.

In a related proceeding, an Administrative Law Judge ("ALJ") of the Board issued a recommended bargaining order pursuant to *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 89 S. Ct. 1918, 23 L. Ed. 2d (1969), on April 5, 2001.

The governing legislation is the National Labor Relations Act ("NLRA"). All decisions are unreported.

JURISDICTION

The District Court of Oregon had subject matter jurisdiction over the underlying dispute pursuant to Section 10(j) of the NLRA, 29 U.S.C. §160(j). The United States Court of Appeals for the Ninth Circuit had appellate jurisdiction pursuant to 28 U.S.C. §§1291 and 1292(a)(1). This Honorable Court has jurisdiction pursuant to 28 U.S.C. §§1253 and 1254.

RELEVANT PROVISIONS INVOLVED

National Labor Relations Act, 29 U.S.C. §151 et seq.

Section 10(j) of the NLRA, 29 U.S.C. § 160(j)

> (j) [Injunctions] The Board shall have power, upon issuance of a complaint as provided in Subsection (b) [of this section] charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

STATEMENT OF THE CASE

A. Background

The Register-Guard publishes a newspaper in Eugene, Oregon. Virtually all of its full-time non-exempt employees – pressmen, newsroom, and typographers – have been represented by labor organizations for many years. The General Counsel introduced no evidence nor claimed that *The Register-Guard* had a history of union *animus*. The total number of employees is approximately 486 individuals, consisting of 298 full-time employees, 155 part-time employees, and 33 "core" employees. "Core" employees are employees who work in the Distribution Department and receive full benefits but do not necessarily work 40 hours per week.

The Distribution Department assembles, and prepares for distribution, the newspaper. At the time of the alleged unfair labor practices, there were 60 employees in the Distribution Department, 33 core employees, and 27 part-time employees. Turnover has been constant in the Distribution Department from a high of 87.8% in 1994 to a low of 30.4% in 1996 to 50.8 % in 2000.

In 1995 the same union (Teamsters Local 206) attempted to organize the department but lost an NLRB-conducted secret ballot election, 30-17. No objections or unfair labor practices were filed. The election was certified on January 17, 1995. The department remained unrepresented.

B. The Register-Guard Grants Wage Increases

The impetus for this case and the Distribution Department employees' flirtation with the union appears to be *The Register-Guard's* inadvertent delay at implementing its yearly wage review. *The Register-Guard* historically surveys wages for its unrepresented, non-exempt employees during the first part of each year. From 1994 to 1999, wage increases were announced and implemented between mid-January and late March of the year, with the exception of 1997 when no increase was implemented.

In the beginning of calendar year 2000, *The Register Guard's* Human Resources Department was overwhelmed with work. The four-person department was engaged in three lawsuits, two collective bargaining negotiations, normal administration of another union contract, and a complete revamping of benefits for all employees. Everything in the Department was delayed by approximately four months. Eventually it focused on wage reviews, including that of the Distribution Department.

During the first half of year 2000, beginning in February and continuing until April 2000, certain Distribution Department employees asked *The Register-Guard* what was the status of their wage increases. Supervisors told employees that wage increases were in the process of review.

Approximately one week to 10 days prior to June 1, 2000, *The Register-Guard*, per past practice, scheduled the entire Distribution Department to meet on June 1, 2000 for a general meeting. The results of the wage reviews were finally ready to be announced. At least one week before the meeting, the Distribution Department work schedule was conspicuously posted in the department for all employees to see. Almost all employees of the department were scheduled to work on June 1, 2000 at overlapping times. From past experience, the employees knew that as a result of this irregular scheduling, there was going to be a meeting.

After the employee work schedule was posted, *The Register-Guard* learned that there had been some "talk" of unions. On May 31, 2000, *The Register-Guard* wrote its Distribution Department employees a letter and expressed its views that the department was better off without a union. Notably, this letter was written ***after*** *The Register-Guard* had planned the wage increase and was as a result of some scattered "talk" of unions.

On June 1, 2000, *The Register-Guard* announced its planned wage increase for Distribution Department employees. It was met with typical mixed reviews. Some

employees were happy with the increase; others griped that the increase was not enough; still others were shocked as the leading union organizer (Bradley Barnhart) had, for the past few months, told employees that the department was not going to receive wage increases.

C. The Union Enters the Fray

On June 13, 2000, Kama Cox ("Cox"), a Distribution Department employee who had a deplorable attendance record, was terminated for her absenteeism and constant tardiness. Cox was a probationary employee. She had been working for only six weeks. At the time of her discharge *The Register-Guard* had no knowledge of her alleged union activity.

The Register-Guard received a letter, via U.S. mail, from the union dated June 13, 2000, listing Ms. Cox as a "cc." The NLRB would later rely upon this June 13, 2000, letter to tag *The Register-Guard* with knowledge of Cox's union activity, even though the letter was not received until June 15, 2000.

During the employees' flirtation with a union, they met with Teamsters Local 206 on May 30, 2002. During the meeting, business agent Stefan Ostrach had some employees signs petitions, not individual cards. From June 1-5, 2000, more employees signed petitions. Ostrach and other signature gatherers failed to rebut the testimony of the many employees who testified that he informed them that the purpose of signing the petition was to get a vote to bring about an election.

On July 7, 2000, *The Register-Guard* employee, and lead union organizer, Bradley Barnhart resigned and moved to Missouri. In his exit interview he had positive statements to make about his employment and even stated that he would recommend that friends work for *The Register-Guard.*

On July 19, 2000, the union filed a charge claiming that the June 13, 2000 discharge of Cox was an unfair labor practice. The charge was amended on August 18, 2000 to claim that *The Register-Guard* had promised employees that it would (i) address their grievances, (ii) grant a wage increase, (iii) grant a night-shift differential, (iv) set up a committee to resolve grievances, (v) provide training, and (vi) provide pizza and soda at future meetings.

The union did not file a Representation Certification petition ("RC petition") with the NLRB at this or any other time. There was no NLRB-conducted secret ballot election. On September 26, 2000, the union, by letter, made a naked demand of recognition from *The Register-Guard*. *The Register-Guard* declined the demand. On September 29, 2000, the union filed an additional charge, claiming that *The Register-Guard* refused to bargain. A previously issued Complaint pertaining to Cox's discharge was amended on October 5, 2000 to include a refusal to bargain allegation.

D. The December 4-6,2000 Administrative Hearing

At the administrative hearing the General Counsel failed to authenticate twenty-one (21) signatures pursuant to FED. R. EVID. 901. Another seventeen (17) employees, whose names were authenticated, testified that they were explicitly told the purpose of the petition was to get a vote as to whether they wanted to be represented by a union, not actually authorize the union to represent them. The General Counsel failed its required demonstration that the union had majority support. Inexplicably, this did not deter the ALJ from recommending a bargaining order on a *Gissel* category II theory.

E. The District Court Errs and Grants a 10(j) Injunction

On February 14, 2000, the General Counsel petitioned the District Court of Oregon for a 10(j) injunction. The court failed to employ a traditional equitable analysis in its

Opinion,[1] and actually endorsed the Board's "reasonable cause" standard, recently abandoned by the United States Court of Appeals for the Ninth Circuit, and granted a 10(j) injunction. The court deferred to the erroneous decision of the ALJ. The Ninth Circuit "rubber stamped" the flawed District Court opinion and order and denied *The Register-Guard's* petition for rehearing *en banc.*

The District Court failed to employ the explicit test of *Miller v. California Pac. Med. Ctr.*, 19 F.3d 499 (9th Cir. 1994) (en banc). The District Court cited *Scott v. Stephen Dunn & Associates*, 241 F.3d 652 (9th Cir. 2001), and did not employ the four-part equitable criteria test mandated by *California Pac. Med. Ctr.* It is from this legally and factually framed opinion and order *The Register-Guard* now petitions this Honorable Court for a Writ of Certiorari.

REASONS FOR GRANTING WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW BY DECIDING: AN INJUNCTION, PURSUANT TO SECTION 10(j) OF THE NLRA SHOULD ISSUE AND BARGAINING SHOULD BE COMPELLED PURSUANT TO *GISSEL* WITHOUT THE UNION OBTAINING MAJORITY SUPPORT, WITHOUT THE UNION OBTAINING UNION AUTHORIZATION CARDS, WITHOUT THE UNION EVER FILING A REPRESENTATION CERTIFCATION PETITION, AND WITHOUT A SECRET BALLOT ELECTION EVER HAVING BEEN HELD.

---

[1] The District Court actually filed two documents entitled "Order." From the documents context it appears that one of the Orders is actually the Opinion. In the interest of clarity, the document that appears to be the Order will be referred to as such and the document that appears to be the Opinion will be referred to as such.

ABSENT FILING AN RC PETITION AND HOLDING AN NLRB-CONDUCTED SECRET BALLOT ELECTION, A CATEGORY II *GISSEL* BARGAINING ORDER IS NOT WARRANTED AND THEREFORE NEITHER IS THE ISSUANCE OF A 10(j) INJUNCTION.

The District Court's ruling, and the Ninth Circuit's affirmation, that a 10(j) injunction is warranted in the instant case is clear error of law, contrary to the facts, and an abuse of discretion. *The Register-Guard* never received objective notice that there was even a question of representation. Objective notice of a question of representation is required by the very Act the Board is commissioned to enforce, the NLRA. Section 9(c)(1) of the NLRA states:

> **Whenever a petition shall have been filed,** in accordance with such regulations as may be prescribed by the Board - . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such a hearing may be conducted by an officer or employee of the Regional Office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. (emphasis added).

29 U.S.C. §159(c)(1) (emphasis added).

The NLRA clearly requires filing an RC petition to create a question of representation and to prompt a secret-ballot election. In the instant case no RC petition was filed to raise an objective question of representation. There are no union authorization cards. There was no offer to "prove up" employee signatures. In the instant case, an "end run" has

been performed around the Act, and a bargaining relationship has been imposed by judicial fiat. *See Boire ex. Rel. NLRB v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1194 (5th Cir. 1975) (interim bargaining order where union was not certified "would create by judicial fiat a relationship that has never existed."); *Fuchs v. Steel Fab Inc.*, 356 F.Supp. 385, 387-88 (D. Mass. 1973) (10(j) injunction denied where employer granted a wage increase after an RC petition filed, but before an election held, because the Board "sought to create a collective bargaining relationship through an injunction."). A bargaining order is especially disfavored to remedy unfair labor practices even where the union has put an employer on notice that there is an objective question of representation. *See Stephen Dunn & Assoc.*, 241 F. 3d at 667 (citing *Gissel*, 395 U.S. at 602, 89 S. Ct. at 1918, 23 L. Ed. 2d 347; *NLRB v. Chatfield Anderson Co.*, 606 F. 2d 266, 268 (9th Cir. 1979) (additional citations and quotations omitted).

A 10(j) injunction is reserved for those cases where such serious and pervasive unfair labor practices warrant injunctive relief to rectify the situation before the administrative process of the Board has reached its natural conclusion. *See, e.g., Szabo v. P*I*E Nationwide, Inc.*, 878 F.2d 207, 209 (7th Cir. 1989). A 10(j) injunction should be rare; it is relief prior to the extraordinary relief of a bargaining order. 10(j) injunctions should not be used in those situations where traditional Board remedies are adequate to rectify the alleged unfair labor practices. *See, e.g., Sharp v. Parents in Community Action, Inc.*, 172 F.3d 1034, 1040 (8th Cir. 2000). 10(j) injunctions are among the most serious weapons in the Board's arsenal and must be used with commensurate care.

In the instant case, the Board has sought a 10(j) injunction in an effort to compel *The Register-Guard*, to recognize and bargain with a union. Forced bargaining, without a union winning a representation election, pursuant to Section 10(j) can only occur when a union at one time enjoyed majority support. The seminal case for this proposition is this Honorable Court's *Gissel* decision.

In *Gissel*, this Honorable Court ruled that if a union possessed valid cards signed by a majority of employees authorizing the union to represent them for collective bargaining, the cards could be used to demonstrate majority support if a union lost an election due to an employer's unfair labor practices. However, "the right of an employer lawfully to refuse to bargain if he had a good faith doubt as to the Union's majority status, even if in fact the Union did represent a majority, was recognized early in the administration of the Act." *See Gissel*, fn. 11, 395 U.S. at 597, 89 S. Ct. at 1931, 23 L. Ed. 2d 547 (citing *NLRB v. Remington Rand, Inc.*, 94 F. 2d 862, 868 (2nd Cir.), *cert. denied*, 304 U.S. 576, 58 S. Ct. 1046, 82 L. Ed. 1540 (1938). This is also an established Board principle. *See Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949), *modified and enf'd*, 185 F.2d 732, (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914, 71 S. Ct. 734, 95 L. Ed. 1350 (1951), and its progeny. An employer may lawfully refuse to bargain even when a union makes a demand to bargain based on majority support.

The Register-Guard absolutely doubted the union's majority status when the union made a demand to bargain on September 26, 2000, ***retroactive*** to June 1, 2000. A retroactive bargaining demand borders on the absurd. The union's "secret majority" supposedly obtained on June 1, 2000, was not claimed until four months later. To this day, *The Register-Guard* doubts the union's dubious claim of majority support because there has been no NLRB-conducted secret-ballot election to effectively gauge employee desires.

A union raises a true question of representation by filing an RC petition. The Board has turned procedure and the standard for objective notice on its head, claiming the May 31, 2000, letter written to Distribution Department employees constituted objective notice of a true question of representation. The May 31, 2000 letter only supports the conclusion that a few employees talked about a union and that *The Register-Guard* learned of it. In response to the talk, *The Register-Guard* disseminated, in written, printed, visual form its opinion and views on the unionization issue.

See 29 U.S.C. §158(c). An RC petition must be filed for "talk of a union" to become an objective question of representation.

When an RC petition is filed, the NLRB immediately notifies the employer by scheduling a hearing and sending it a copy of the underlying RC petition. *See* NLRB Rules and Regulations, 29 C.F.R. §102.63 (2001). Even at that point an election is not scheduled. The NLRB seeks from the employer the names of all employees in the group trying to organize; the purpose is to make sure that the union has actually obtained signatures on cards from individuals who are truly employees of this employer and to make sure that the union has signatures of at least 30 per cent of the employees in the group trying to organize. *See* NLRB Rules and Regulations, 29 C.F.R. §102.60 (2001); *Also see* 29 U.S.C. 159(c). A union must make a proper showing of interest.

Even this is not enough. The NLRB then schedules a hearing to litigate issues of voter eligibility and issues over whether the group trying to organize constitutes "an appropriate unit." *See* NLRB Rules and Regulations, 29 C.F.R. §102.64 (2001). Only then does the NLRB set an election date.

The entire purpose of the Statute and the Rules and Regulations is to provide everyone notice and due process to make sure there is a true, objective question of representation followed by a secret ballot election after a period of campaign and debate so employees can make an informed decision.

As recently as March 29, 2001, in *Levitz Furniture Company*, 333 NLRB No. 105 (2001), the NLRB stated, "the Board and the courts have consistently said that Board elections are the preferred method of testing employees' support for unions." 333 NLRB No. 105, *slip op.* at 38. *See also*, *Gissel*, 395 U.S. at 596, 89 S. Ct. at 1931, 23 L. Ed. 2d 547 (1969); ("Secret elections are generally the most satisfactory – indeed the preferred – method of ascertaining whether the

union has majority support."); *Be-Lo Stores v. NLRB*, 126 F.3d 268 (4th Cir. 1997) ("the extraordinary and drastic remedy of forced bargaining . . . is reserved for only the most unusual cases."); *Avecor, Inc. v. NLRB*, 931 F.2d 924, 938 (D.C. Cir. 1991) ("A bargaining order is not a snake oil cure for whatever ails the workplace; it is an extreme remedy that must be applied with commensurate care.").

In every category II *Gissel* case, where a bargaining order has been the remedy, a union filed an RC petition, lost an election, and bargaining was ordered because a fair re-run election could not be held. Even so, the Board has not fared well in the United States Courts of Appeals in category II *Gissel* cases imposing a bargaining order. *See Gardner Mechanical Services, Inc. v. NLRB*, 115 F.3d 636, 643 (9th Cir. 1997) (*Gissel* category II bargaining order not enforced because, "There has been no finding that the unfair labor practices are so severe or pervasive as to make a fair election impossible. Moreover, an election remains the preferred method for selection of a bargaining unit's representative. Only an election guarantees employees their choice of representative." (internal citations omitted); *NLRB v. Peninsula Ass'n for Retarded Children and Adults*, 627 F.2d 202 (9th Cir. 1980) (*Gissel* category II bargaining order not enforced because the court recognized that an election is the preferred method for selecting a bargaining unit's representative and the denial of that right would impose a union on employees.); *NLRB v. Chatfield-Anderson Co., Inc.*, 606 F.2d 266, 268 (9th Cir. 1979) (*Gissel* category II bargaining order not enforced because "a bargaining order based on authorization cards is less desirable than the free expression of employees in a fair election." (citing *Gissel*, 395 U.S. at 602, 89 S.Ct. at 1934); *NLRB v. Pacific Southwest Airlines*, 550 F.2d at 1152-53); *NLRB v. Western Drug*, 600 F.2d 1324 (9th Cir. 1979) (Refusal to enforce a *Gissel* category II bargaining order because traditional remedies would be more appropriate); *See also Douglas Foods Corp. v. NLRB*, 251 F.3d 1056 (D.C. Cir. 2001); *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166 (D.C. Cir. 1998; *NLRB v. Taylor Machine Products, Inc.*, 136 F.3d 507 (6th Cir. 1998)

(Overturning *Gissel* II bargaining order for Board's failing to explain why other remedies would prevent a fair election); *Accord, Be-Lo Stores v. NLRB*, 126 F.3d 268 (4th Cir. 1997); *Skyline Distributors v. NRLB*, 99 F.3d 403 (D.C. Cir. 1996) (Overturning bargaining order for Board's failure to state how and why traditional remedies were inappropriate), *Kinney Drugs, Inc., v. NLRB*, 74 F.3d 1419 (2nd Cir. 1996); *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074 (D.C. Cir. 1996), *J.L.M. Inc. v. NLRB*, 31 F.3d 79 (2nd Cir. 1994); *Somerset Welding & Steel, Inc. v. NLRB*, 987 F.2d 777, 781 (D.C. Cir. 1993) (declining to enforce bargaining order where "no reasoned justification therefore appear[ed] in the Board's order."); *Avecor, Inc. v. NLRB*, 931 F.2d 924 (D.C. Cir. 1991); *Montgomery Ward & Co. v. NLRB*, 904 F.2d 1156 (7th Cir. 1990) (remanded because the Board failed to examine whether traditional remedies could be utilized to ensure a fair election); *St. Agnes Medical Center v. NLRB*, 871 F.2d 137 (D.C. Cir. 1989) (Board failed to examine whether traditional remedies could erase the effects of unfair labor practices and ensure a fair rerun election); *Impact Industries, Inc. v. NLRB*, 847 F.2d 379, 383 (7th Cir. 1988) (Enforcement denied because Board "should have considered all of the relevant evidence before determining that a bargaining order was warranted."). Even in *Gissel*, this Honorable court did not impose a bargaining order.

Unions must risk the ballot box. This is the law. *Gissel* is not part of the NLRA. *Gissel* is a judicially-crafted rule where bargaining is ordered in rare circumstances when a fair re-run election is not possible.

The ALJ failed to provide a detailed analysis as to why traditional NLRA remedies would not be effective and a bargaining order is warranted. *See Douglas Foods Corp.*, 251 F.3d at 1066. ("The NLRB cannot discharge its obligation (to explain why a bargaining order is appropriate) merely by citing the appropriate authority and averring that it gave proper consideration. It actually must consider the factors as they apply to the instant case, and explain the basis for its conclusions."). The ALJ's decision is speculative. We will

never know if the union would have won an election because it never once filed an RC petition.

The ALJ's decision and recommended order, if adopted by the NLRB, is likely to be viewed with hostility by a Court of Appeals. The NLRB has been often chastised by United States Courts of Appeals for issuing *Gissel* bargaining orders instead of the preferred remedy of a re-run election. *See, e.g., Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1079 (D.C. Cir. 1996) ("As a consequence of its stubborn refusal to accept the holdings of virtually every circuit that has considered the matter, [the NLRB] has squandered a vast amount of our time as well as its own and has caused delays in the ultimate resolution of cases. . ."); *Harpercollins San Francisco v. NLRB*, 79 F.3d 1324, 1332 (2nd Cir. 1996) ("Specifically, the NLRB has once again flouted the mandates of this circuit and has ignored our consistent holdings that events subsequent to the employer's violations, such as the passage of time and the substantial turnover of employees, are relevant and important factors which should be considered in an effort to assess the possibility of a free and uncoerced election under current conditions."); *NLRB v. Taylor Machine Products*, 136 F.3d 507 (6th Cir. 1998) ("Although the Board stated that violations would cause lingering effect, it did not explain why the other remedies that it also ordered in this case would be insufficient to dissipate the lore of the shop and would not ensure a fair election.").

Here, there was never an RC petition filed. No NLRB-conducted secret ballot election was held. If the union here had risked the ballot box, it may have won. We will never know. However, our entire statutory framework was set up to avoid exactly what happened here: ordering an Employer to bargain with a union that never filed an RC petition (raising an objective question of representation), thereby saddling employees with union representation without the right to vote in an NLRB secret ballot, democratic election.

The ALJ's recommended bargaining order in this case fails to follow the NLRB's own precedent.[2] *See P.H.Nursing Home, Inc.*, 332 NLRB No. 21, slip op. at 5 (2000) (NLRB rejected ALJ's recommended category II *Gissel* bargaining order because employer's conduct – threats, intimidation, termination of union adherent, unsolicited benefits, and promises – was "more restrictive than that found in any case where a bargaining order was issued ..."). There is no precedent to support a bargaining order in the instant case, much less a 10(j) injunction. The Board is supposed to apply the law on the books, not lower the bar for unions to obtain bargaining orders. If the recommendation for a bargaining order is flawed, there is certainly no basis for a 10(j) injunction. In situations where a 10(j) injunction has been granted, the union filed an RC petition and an NLRB secret ballot election was held. *See, e.g., Stephen Dunn & Associates*, 241 F.3d 652, 644 (9th Cir. 2001); *Arlook v. S. Lichtenberg & Company, Inc.*, 952 F.2d 367 (11th Cir. 1992).

This is a case of first impression. ***No court has issued a 10(j) injunction ordering an employer to bargain on a Gissel category II theory without a union having filed an RC petition, losing an NLRB-conducted secret ballot election, and not having union authorization cards to demonstrate majority support.***

---

[2] The ALJ's recommended decision and order issued April 5, 2001. *The Register-Guard* filed exceptions with the NLRB on May 8, 2001. As of the filing of this petition, the NLRB has not reviewed the ALJ decision. The instant 10(j) injunction was issued by the District Court of Oregon on May 1, 2001.

II. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAS SANCTIONED THE DISTRICT COURT OF OREGON'S DEPARTURE FROM ACCEPTED AND USUSAL JUDICIAL PROCEEDINGS.

A. THE DISTRICT COURT OF OREGON RELIED ON THE ERRONEOUS RECOMMENDATION OF THE ALJ AND AFFORDED ENTIRELY TOO MUCH DEFERENCE TO THE RECOMMENDATION; THE DISTRICT COURT DID NOT EMPLOY AN INDEPENDENT ANALYSIS TO RENDER ITS DECISION.

The District Court gave entirely too much deference to the recommendation of the ALJ. The judiciary is not bound by an erroneous ALJ recommendation. *See San Francisco-Oakland Newspaper Guild, et. al. v. Kennedy*, 412 F.2d 541, fn 1 (9th Cir. 1969) citing *Slater v. Denver Building and Construction Trades Council*, 175 F.2d 608 (10th Cir. 1949).

A District Court should not defer to an ALJ recommendation when evaluating a 10(j) request. "[I]t is the Courts of Appeal which are obliged to afford deferential review to final Board determinations, not the district courts in response to preliminary requests." *California Pac. Med. Ctr.*, 19 F.3d at 458; *Pilot Freight Carriers, Inc.* 515 F.2d at 1193 ("The Chancellor does not abdicate his powers merely on a showing that the Regional Director's theories surpass frivolity."). The District Court seems to have totally deferred to the erroneous ALJ recommendation.

The ALJ's decision is rife with error. Just one example is the ALJ's citation of *Ona Corp. v. NLRB*, 729 F.2d 713, 723-24 (11th Cir. 1984), for the proposition that a petition, not authorization cards, have been approved by the courts for a showing of majority support. In *Ona Corp.*, 102 authorization cards were invalidated. The citation is not only

incorrect but can be considered misleading, as an authorization card requiring a single signature is totally different from a petition containing many signatures. It is incredible that the ALJ cited *Ona Corp.* to support any part of his decision, much less that a petition has the same legal effect as a union authorization card.

The ALJ engaged in a "mechanical application" of the *Shoe* doctrine, an action explicitly condemned in *Gissel. See* 395 U.S. at 607-08, 89 S.Ct. at 1937, 23 L.Ed.2d 547 (referring to *Cumberland Shoe Corp.*, 144 NLRB 1268 (1963) (holding that employees should be bound by the clear language of a union authorization card unless a union adherent has used words to cancel or inform the signatory to disregard the language at the top of the card.)).

In *Gissel* this Honorable Court ruled that when an employee signs an authorization card – of which there are none in the instant case -- based on a solicitor's:

> explicit or indirectly express representation that they will use such cards only for an election and subsequently seek to use them for a different purpose . . . does not of course imply that a finding of misrepresentation is confined to situations where employees are expressly told *in haec verba* that the "sole" or "only" purpose of the cards is to obtain an election ***The Board has never suggested such a mechanistic approach as some have contended.*** The Board looks to substance rather than form. ***It is not the use or nonuse of certain key or "magic" words that is controlling, but whether or not the totality of the circumstances surrounding the card solicitations such as to add up to an assurance to the card signer that his card will be used for no purpose other than to help get an election.***

Gissel, fn. 27, 395 U.S. at 609, 89 S. Ct. at 1937, 23 L. Ed. 2d 547 (emphasis added) (citing *Levi Strauss & Co.*, 172 NLRB 732, 734 fn. 6. (1968)).

Immediately after *Gissel*, the Ninth Circuit, in *NLRB v. South Bay Daily Breeze*, found that testimony indicating that an employee "wanted to get a vote" was sufficient to invalidate an authorization card. *See* 415 F.2d at 360, 366 (9th Cir. 1969); *See also, NLRB v. Randall P. Kane, Inc.*, 581 F.2d 215 (9th Cir. 1978) (NLRB admonished for applying a mechanical application of *Cumberland Shoe* doctrine); *NLRB v. Ed Chandler Ford, Inc.*, 718 F.2d 892 (9th Cir. 1983) (authorization card invalid where the employee was told that the purpose of signing the card was to authorize an election). In the instant case, the Ninth Circuit has ignored its own precedent and this Honorable Court's precedent.

If a 10(j) injunction can be issued under these circumstances, a union need never risk the ballot box again. Section 9 of the NLRA is effectively repealed. All a union now needs to do is make a little "noise" of organizing activity and, if the employer engages in normal day-to-day business operations, a union need only file unfair labor practice charges to obtain a bargaining order. With this new standard, employees are deprived of a free choice, a secret ballot. Employers are deprived of objective notice that a true question of representation exists, derogating basic due process rights. The absence of filing an RC petition with the Board and holding a secret ballot representation election forecloses a labor organization from obtaining a 10(j) injunction on category II *Gissel* theory. A party must avail itself of the NLRA's process and procedures to seek its remedies.

III. THE UNITED STATES COURTS OF APPEALS ARE IN CONFLICT OVER THE APPROPRIATE STANDARD TO EMPLOY WHEN ANALYZING THE PROPRIETY OF AN INJUNCTION PURSUANT TO SECTION 10(j) OF THE NLRA.

A. THE APPROPRIATE STANDARD FOR DETERMINING THE PROPRIETY OF AN INJUNCTION PURSUANT TO SECTION 10(j) OF THE NLRA IS THE "EQUITABLE CRITERIA" TEST ADVANCED BY THIS HONORABLE COURT.

The United States Courts of Appeals are divided over the appropriate standard to employ to determine the propriety of a 10(j) injunction. The United States Courts of Appeals for the Third, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits employ the standard advocated by the Board, the "reasonable cause/just and proper" test. *See, e.g., Hirsch v. Dorsey Trailers, Inc.*, 147 F.3d 243, 247 (3rd Cir. 1998); *Sachs v. Davis & Hemphill, Inc.*, 71 L.R.R.M. (BNA) 2126, *withdrawn and dismissed*, 72 L.R.R.M. (BNA) 2879 (4th Cir. 1969); *Pilot Freight Carriers, Inc.*, 515 F.2d at, 1192; *Schaub v. Detroit Newspaper Agency*, 154 F.3d 276, 278-79 (6th Cir. 1998); *Angle v. Sacks*, 382 F.2d 655, 659-61 (10th Cir. 1967); *Arlook v. S. Lichtenberg & Co.*, 952 F.2d at, 369.

In contrast, in later decisions, the United States Courts of Appeals for the Seventh, Eighth, Ninth, and District of Columbia Circuits apply traditional equitable criteria principles in analyzing the propriety of a 10(j) injunction. *See Kinney v. Pioneer Press*, 881 F.2d 485, 493 (7th Cir. 1989); *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1566-67 (7th Cir. 1996), *cert denied*, 519 U.S. 1055, 117 S. Ct. 683, 136 L. Ed. 2d 608 (1997); *Sharp v. Parents in Community Action, Inc.*, 172 F.3d 1034, 1037-38 (8th Cir. 1999); *Miller v. California Pac. Med. Ctr.*, 19 F.3d 449, 459-60 (9th Cir. 1994) (en banc); *D'Amico v. United States Serv. Indus., Inc.*, 867 F.Supp. 1075 (D.D.C. 1994) (D.C. Circuit did not expressly rule on this issue, but embraced the rationale of the Ninth Circuit's

California Pac. Med. Ctr. decision and the Seventh Circuit's *Pioneer Press* decision).

The words "reasonable cause" do not exist in Section 10(j) of the NLRA. The words "just and proper," are in Section 10(j). The reasonable cause/just and proper standard, stems from Section 10(l) of the NLRA, which requires the Board to seek a preliminary injunction in a select group of allegations that immediately threaten interstate commerce. *See* 29 U.S.C. 160(l). Section 10(l) mandates that when:

> ... the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition ... for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper ...

There is no "reasonable cause" element to a 10(j) proceeding. Section 10(j) relief is discretionary. The necessary analysis in a 10(j) proceeding is whether the relief sought by the Board is "just and proper." As this Honorable Court explained:

> Of course, Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles ... "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the courts' jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."

Weinberger v. Romero-Barcelo, 456 U.S. 305, 313, 102 S. Ct. 1798, 1803-04, 72 L. Ed. 2d 91 (1982), quoting from *Porter v. Warner Holding Co.*, 328 U.S. 395, 398, 66 S. Ct. 1086, 1089, 90 L. Ed. 1332 (1946). "Just and proper" has continually been interpreted to apply traditional rules of equity. *See Pioneer Press*, 881 F.2d at 491, (internal citations omitted).

United States District Courts and Courts of Appeals have historically, erroneously, applied Section 10(l) of the NLRA onto Section 10(j) proceedings. *See Pioneer Press* at 491-93. The United States Court of Appeals for the Seventh Circuit appears to be the first United States Court of Appeals to examine the differences and nuances between Section 10(j) and 10(l) of the NLRA. *Id.* at 487-93. Not surprisingly, *Pioneer Press* was the first decision where a Court of Appeals endorsed a traditional equitable criteria test to determine the propriety of a 10(j) injunction. Since this analysis, Sister Courts of Appeals have embraced and endorsed the rationale of *Pioneer Press*. *See Parents in Community Action*, 172 F.3d at 1037-38; *California Pac. Med. Ctr.*, 19 F.3d at 459-60; *United States Serv. Indus., Inc.*, 867 F.Supp. 1075. *Pioneer Press* explained, through the plain text and legislative history of the NLRA, that if Congress wanted courts to employ a traditional equitable criteria analysis to a Section 10(j) analysis, "it would leave 'reasonable cause' out of §10(j) while putting that language in 10(l) – which is what Congress did." *Id.* at 490.

B. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DID NOT APPROPRIATELY EMPLOY TRADITIONAL RULES OF EQUITY WHEN IT AFFIRMED THE FLAWED DISTRICT COURT OPINION AND ORDER.

The United States District Court below applied the wrong legal standard in issuing the 10(j) injunction. It failed to apply traditional, equitable principles to determine the propriety of a 10(j) injunction.

In *California Pac. Med. Ctr.*, the Ninth Circuit ruled that in the context of a 10(j) injunction proceeding, the "reasonable cause/just and proper standard" advocated by the Board "does not comport with the language of §10(j) or with Supreme Court precedent which requires balancing competing claims of injury and the effect on each party of granting and withholding injunctive relief." 19 F.3d at 456 (citing *Weinberger v. Romero-Barcelo*). Thus, in determining whether to issue a 10(j) injunction, a court should consider the following factors:

1. The likelihood of the moving party's success on the merits.

2. The possibility of irreparable injury to the moving party if relief is not granted.

3. The extent to which the balance of hardships favors the respective parties.

4. Whether the public interest will be advanced by granting the preliminary relief.

The District Court below granted the injunction, "finding and concluding that there is reasonable cause to believe that [*The Register-Guard* violated the NLRA] and that such acts and conduct will likely be repeated or continued unless enjoined." The order and accompanying opinion did not apply traditional rules of equity. There was absolutely no consideration of whether the public interest would be advanced by granting the 10(j) injunction. The rights of the individuals most affected by the 10(j) injunction – the Distribution Department employees – were totally disregarded. The rights of employees have been wholly ignored to further the ambitions of the union and support the Board's legal adventurism.

A 10(j) injunction is supposed to "protect the integrity of the collective bargaining process and to preserve the [Board]'s remedial power while the Board resolves an unfair

labor practice charge." *California Pac. Med. Ctr.*, 19 F.3d at 452. In the instant case, the union has, with Board approval, eviscerated the NLRA and enabled a union to subsume previously unrepresented employees without approval from the very employees the union now represents only through injunctive relief. This result is not "just and proper." By no stretch of the imagination does such a result comport with the letter or spirit of the NLRA, or any possible legislative intent claimed to be behind the NLRA.

1. THERE IS NO LIKELIHOOD OF SUCCESS ON APPEAL.

The Board alleges that the alleged unfair labor practices, especially a wage increase, so chilled the union organizing drive that injunctive relief was warranted. A wage increase, in and of itself, does not support a bargaining order. *See Skyline Distributors v. NLRB*, 99 F.3d 403, 410 (D.C. Cir. 1996) ("The Board has not come close to satisfying [the *Gissel*] standard, for there are no comprehensible findings by the Board that the granting of benefits somehow impeded the election process or that a fair election could not have been ensured by the use of traditional remedies. Indeed, the Board's decision to issue a bargaining order in this case is so lacking in evidentiary support and reasoned decisionmaking that it seems whimsical."); *NLRB v. Gruber's Supermarket, Inc.*, 501 F.2d 697 (7th Cir. 1974). It cannot support a 10(j) injunction. Granting a wage increase outside of a "critical period," i.e. after an RC petition has been filed, but before an election is certified, cannot be an unfair labor practice. Without an RC petition, an employer has no objective notice that there truly exists a question of representation.

Even so, analytical evidence suggests that union election results are based more upon employee predispositions such as, attitudes, job experience, age, race, sex, educational level, etc.; and previous experience with unions. *See e.g.*, J.G. Getman, S.B. Goldberg, & J.B. Herman, *Union Representation Elections, Law and Reality*, 53-72, (1976); Hills, *The Attitudes of Union and Non Union Mail*

Workers toward Union Representation, 38 Indus. & Lab. Rel. Rev., 179 (1985). Empirical studies suggest that unlawful employer activity during an election campaign does not coerce or intimidate employees to reject a union. *See* Cooper, *Authorization Cards and Union Representation Election Outcome: An Empirical Assessment of the Supreme Court's Gissel Decision*, 79 N.W.U.L. Rev. 87 115-17, 139-40 (1984) (Analyzing 760 elections occurring in NLRB Region 18 (Minneapolis) from 1978-1980). Further, former Dean of Harvard Law School, Derrick C. Bok, suggested that a few union organizers actually provoke employee discharges to deliberately rally employees against an employer prior to an election. *See* Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 40 (1964).

Thus, where no election was pending, the union never filed an RC petition, the union made no demand to bargain, the union never offered to prove majority support, and the Company received no objective notice that there was a question of representation, granting a regularly scheduled wage increase did not violate the Act.

2. THERE IS NO IRREPARABLE INJURY TO THE NLRB AND ITS PROCESSES IF THE 10(j) INJUNCTION IS VACATED AND/OR DISSOLVED.

This case is nothing more than an attempt by the Board to try to lower the bar to obtain a 10(j) injunction. The District Court's order undermines *Gissel* and ratifies the Board's "view that bargaining orders should be liberally granted as remedies despite evidence that a new election would suffice." *Stephen Dunn & Assoc.*, 241 F.3d at 673 (Sneed dissenting), citing *J. J. Newberry Co. v. NLRB*, 645 F.2d 148, 154 (2nd Cir. 1981).

A bargaining order simply will not stand in this case because:

> ... the Board has given no credence whatsoever to employee "free choice." One of the principal protections of the NLRA is the right of employees to bargain collectively through representatives of their own choosing or to refrain from such activity. *See Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737, 81 S. Ct. 1603, 1607, 6 L. Ed. 2d 762 (1961). This is an inviolate right under the NLRA, one that the Court in *Gissel* did not mean to undermine. *See Gissel*, 395 U.S. at 614, 89 S. Ct. at 1940 (" ... effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior."). In other words, the Court thus anchored its holding in *Gissel* to the NLRA's core principle that a majority of employees should be free to accept or reject union representation." *Conair Corp. v. NLRB*, 721 F.2d 1355, 1380-81 (D.C. Cir. 1983).

Skyline Distributors v. NLRB, 99 F.3d at 411.

To grant a 10(j) injunction under the facts of this case will open the floodgates and encourage the Board to seek an injunction for every, and any, alleged violation of law. *See Weinberger v. Romero-Barcelo*, 456 U.S. at 313, 102, S.Ct. at 1803, 72 L.Ed. 91 (1982) ("the grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal Judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law."). The Board's normal remedial processes will work fine in this case.

3. A BALANCING OF HARDSHIPS WEIGHS HEAVILY IN FAVOR OF VACATING AND/OR DISSOLVING THE 10(j) INJUNCTION.

A 10 injunction harms *The Register-Guard* by limiting its inherent management right to make unilateral changes for

legitimate business reasons, a freedom of action it has enjoyed for decades. Forced bargaining wastes the resources of *The Register-Guard* by subjecting it to incur the financial burden of hiring counsel to engage in negotiations. Forced bargaining is a time consuming burden. Forced bargaining imposes a union on a department that had previously resisted the very same union's organizing drive five years earlier. Forced bargaining threatens the good will *The Register-Guard* has enjoyed with its employees. Forced bargaining undermines good faith bargaining as the union and *The Register-Guard* conduct negotiations in "limbo," uncertain if the injunction is warranted.

What is most egregious in this case is that union representation has been imposed on employees who ***never*** had the chance to vote after a vigorous campaign by both union and employer as provided in the NLRA. The union never filed an RC petition. It could very well be that the union feared it would lose. This same union tried once before to unionize these same employees and lost an NLRB-conducted secret ballot election. The union could not win fair and square; now, with NLRB complicity, it is trying to win the lottery without buying a ticket! The union wants a bargaining order without having to convince the employees that they would benefit from the collective bargaining process.

A 10(j) injunction destroys the rights of the employees in the Distribution Department to ***refrain*** from engaging in union activity. "The core principles underlying the Act are 'freedom of choice and majority rule in employees' selection of representatives.'" *Stephen Dunn & Assoc.*, 241 F.3d at 671 (Sneed dissenting) (citing *Con Air Corporation v. NLRB*, 721 F.2d 1355, 1381 (D.C. Cir. 1983); 29 U.S.C. §159(a). Category II *Gissel* bargaining order cases all stem from circumstances where an employer prevented a free and fair election. In the instant case, the union prevented a free and fair election; it never filed an RC petition. The question of whether a free and fair election could be held has never been asked; therefore, it cannot be answered.

4. THE PUBLIC INTEREST IS BEST SERVED BY DENYING AND/OR DISSOLVING THE 10(j) INJUNCTION.

A 10(j) injunction in this case effectively erases Section 9 of the NLRA. Rumor and innuendo now serve as objective notice to employers that there is a question of representation. If an injunction is imposed, there is no longer the need for objective notice in certifying a collective bargaining representative. Employers must now consider gossip before making legitimate business decisions. The specter of an unfair labor practice looms at every turn.

The public interest lies in preserving Section 9 of the NLRA. The instant case creates a mechanism for unions to force themselves upon employees in situations where it is total speculation as to whether the union would ever have been freely selected.

CONCLUSION

Wherefore, Petitioner, *The Register-Guard* requests that this Honorable Court grant its Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

THE ZINSER LAW FIRM, P.C.

L. Michael Zinser, TN Bar No. 2423
Glenn E. Plosa
150 Second Avenue North, Suite 410
Nashville, Tennessee 37201
Telephone: 615.244.9700
Facsimile: 615.244.9734

No. 01-35481

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAYMOND D. WILLIAMS, Acting Regional Director of the Nineteenth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board,
Plaintiff-Appellee,

v.

GUARD PUBLISHING COMPANY, d/b/a
The Register- Guard

Filed August 19, 2001

ORDER

Before: TASHIMA and GOULD, Circuit Judges

Appellant's motion for a stay pending appeal of the district court's temporary injunction is denied. Appellee' s motion to file an oversized opposition to the stay motion is granted. Appellant's motion to file supplemental excerpts of the record is granted.

No. 01-35481

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAYMOND D. WILLMS, Acting Regional Director of the Nineteenth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board,
Plaintiff - Appellee,

v.

GUARD PUBLISHING COMPANY, d/b/a The Register-Guard,
Defendant - Appellant.

November 5, 2001, Argued and
Submitted, Portland, Oregon

January 10, 2002, Filed

RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

COUNSEL:
For RAYMOND D. WILLMS, Plaintiff - Appellee: Aaron Karsh, Esq., NATIONAL LABOR RELATIONS BOARD, Office of the General Counsel, Judith I. Katz, John A. Mantz, Attorneys, NATIONAL LABOR RELATIONS BOARD, Washington, DC.

For GUARD PUBLISHING COMPANY, Defendant - Appellant: Sharon A. Rudnick, Esq., HARRANG, LONG, GARY, RUDINCK, P.C., Eugene, OR.

For GUARD PUBLISHING COMPANY, Defendant - Appellant: L. Michael Zinser, Esq., THE ZINSER LAW FIRM, P.L.L.C., Nashville, TN.

For GUARD PUBLISHING COMPANY, Defendant - Appellant: William H. Bruckner, Esq., BRUCKNER BURCH P.L.L.C., Houston, TX.

JUDGES:
Before: HUG, T.G. NELSON and GOULD, Circuit Judges.

OPINION:

MEMORANDUM *

Guard Publishing Company, publisher of the Register-Guard newspaper in Eugene, Oregon, appeals the district court's order granting the Regional Director of the NLRB a temporary injunction and interim bargaining order under § 10(j) of the National Labor Relations Act. 29 U.S.C. § 160(j). We affirm the district court's decision. Because the parties are familiar with the factual and procedural history of this case, we will not recount it here.

A district court's decision to grant or deny a 10(j) injunction will be reversed if the district court "abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." Scott v. Stephen Dunn & Assocs., 241 F.3d 652, 659 (9th Cir. 2001) (citation and internal quotation marks omitted).

To secure relief under § 10(j), the Regional Director must show "either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) the existence of serious questions going to the merits, the balance of hardships tipping sharply in its favor, and at least a fair chance of success on the merits." Miller v. Cal. Pacific Med. Ctr., 19 F.3d 449, 456 (9th Cir. 1994)(en banc) (quoting Senate of Cal. v. Mosbacher, 968 F.2d 974, 977 (9th Cir. 1992)). These formulations represent "two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." United States v. Odessa Union Warehouse Co-op, 833 F.2d 172, 174 (9th Cir. 1987). In addition, when ruling on the propriety of § 10(j) relief, the district court must balance the NLRB's ability to meaningfully adjudicate disputes arising within its

jurisdiction against the respondent's showing of hardship. Scott, 241 F.3d at 661. n1

In this case, the Regional Director charged Guard with several unfair labor practices, including discriminatory discharge, promising and providing employees with increased benefits to discourage union support, and creating the impression among employees that the company was monitoring protected concerted activities. On the basis of its own review and the findings and conclusions of the administrative law judge (which the district court incorporated by reference), the court below essentially found it probable that the Regional Director will prove its violations before the NLRB and obtain the equitable relief it seeks, including an interim bargaining order. As this holding of probable success necessarily includes a presumption of irreparable harm, the district court followed its probability discussion with a review of Guard's hardship argument, which it found insufficient. See Miller, 19 F.3d at 460. Given its finding that the Regional Director could show both probable success and irreparable harm, and that Guard had no credible hardship argument, the district court granted the Regional Director's request for § 10(j) relief.

Applying the standard of review set forth above, we cannot say that the district court's decision was erroneous. None of the factual findings on which the district court rested its decision strike us as clearly erroneous. Moreover, as the district court identified the correct legal standards, and applied them in a reasonable manner, we conclude that the district court did not base its decision on an erroneous legal standard and that it did not abuse its discretion. Because we cannot find error under the relevant standards of review, the district court's grant of a § 10(j) temporary injunction is AFFIRMED.

----------Footnotes----------

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

n1 Guard argues that the district court incorrectly applied the now defunct "reasonable cause" test in deciding whether to grant the Regional Director § 10(j) relief. In support of its argument, Guard points to a portion of the judgment-order below in which the district court states that "there is reasonable cause to believe" that Guard has engaged in certain unfair labor practices. While it is true that the district court used this terminology, it is clear from the opinion-order accompanying the judgment-order that the district court identified and applied the correct legal standard in reaching its decision, regardless of the "reasonable cause" language. As such, Guard's argument on this issue is unpersuasive.

Civil No. 01-6079-TC

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

RAYMOND WILLMS, Acting Regional Director of the Nineteenth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD
Petitioner,

v.

THE GUARD PUBLISHING COMPANY
d/b/a THE REGISTER GUARD,
Respondent.

Filed: May 1, 2001

ORDER GRANTING TEMPORARY INJUNCTION

This cause came on to be heard upon the verified petition of Raymond Willms, Acting Regional Director of Region 19 of the National Labor Relations Board, for and on behalf of the Board, for a temporary injunction pursuant to Section 10(j) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 160(j), herein called the Act, pending final disposition of the matters involved herein pending before the Board, and upon the issuance of an order to show cause why injunctive relief should not be granted as prayed in said Petition. The Court, after a hearing in open court at which all parties had opportunity to be represented by counsel, upon consideration of the pleadings, evidence, briefs, arguments of counsel and the entire record in this case, has made and filed its Findings of Fact and Conclusions of Law, finding and concluding that there is reasonable cause to believe that Respondent The Guard Publishing Company d/b/a The Register Guard has engaged in, and is engaging in, acts and conduct in violation of 29 U.S.C. Sec. 158 affecting commerce within the meaning of 29 U.S.C. Sec. 152(6) and (7), and that such acts and

conduct will likely be repeated or continued unless enjoined. NOW THEREFORE, upon the entire record, it is

1. ORDERED, ADJUSTED, and DECREED that, pending the final disposition of the matters involved now before the National Labor Relations Board, that Respondent, the Guard Publishing Company d/b/a The Register Guard, its officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with it be, and they hereby are, enjoined and restrained from:

(a) Terminating, disciplining, discriminating and/or taking any other adverse, actions against employees because they support the Teamsters Local Union No. 206, affiliated with International Brotherhood of Teamsters, AFL-CIO or engage in protected concerted activities;

(b) Creating the impression among its employees that their union and/or protected concerted activities are under surveillance;

(c) Soliciting employees' complaints and grievances and thereby implying that it will grant employees increased or improved benefits if employees refrain from supporting and/or assisting Teamsters Local Union No. 206, affiliated with International Brotherhood of Teamsters, AFL-CIO, or any other union;

(d) Promising employees increased or improved benefits if they refrain from supporting and/or assisting Teamsters Local Union No. 206, affiliated with International Brotherhood of Teamsters, AFL-CIO, or any other union;

(e) Providing increased benefits to employees to encourage them to refrain from supporting and/or assisting Teamsters Local Union No. 206, affiliated with International Brotherhood of Teamsters, AFL-CIO; and

(f) In any like or related manner interfering with, restraining or coercing employees in the rights guaranteed

them by Section 7 of the Act.

2. In addition, Respondent is hereby ORDERED to take the following affirmative action:

(a) Offer employee Kama Cox interim reinstatement to her former job, with the same seniority and terms and conditions of employment she would have had she not been terminated, displacing, if necessary, any newly hired or reassigned worker, or if her former position no longer exists, to a substantially equivalent position and employment terms;

(b) Expunge from its personnel files all references to the discharge of employee Kama Cox, and to refrain from relying on such discipline in any personnel matters or decisions;

(c) Recognize and, upon request, bargain in good faith with Teamsters Local Union No. 206, affiliated with International Brotherhood of Teamsters, AFL-CIO as the exclusive bargaining representative of the Respondent's Unit employees concerning their wages hours and other terms or conditions of employment and embody in a written signed agreement any understandings reached with the Union regarding these employees

(d) Post copies of the District Court's opinion and order at Respondent's premises in all places where notices to its affected employees are normally posted; maintain these postings during the Board's administrative proceeding free from all obstructions and defacements; and grant to agents of the Board reasonable access to the Respondent's Facility to monitor compliance with this posting requirement; and

(e) Within twenty (20) days of the issuance of this Decree, file with the District Court and serve a copy upon the Regional Director of Region 19 of the Board, a sworn affidavit from a responsible official describing with specificity the manner in which Respondent has complied with the terms of this decree, including how it has posted the documents required under this Order.

DATED at Eugene, Oregon this, 1st day of May 2001.

United States Magistrate Judge

Presented by:

Counsel for Petitioner

Civil No. 01-6079-TC

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

RAYMOND WILLMS, Acting Regional Director of the Nineteenth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD
Petitioner,

v.

THE GUARD PUBLISHING COMPANY d/b/a THE REGISTER GUARD,
Respondent.

Filed: May 1, 2001

ORDER

COFFIN, Magistrate Judge:

Petitioner seeks a temporary injunction to remedy alleged violations of the National Labor Relations Act, 29 U.S.C. §158 (a) (1), (3) and (5), pending final adjudication by the National Labor Relations Board.[1] Prior to oral argument, Administrative Law Judge Albert A. Metz issued his decision in this case, which included findings of several unlawful labor practices and recommendation that the NLRB grant all relief requested by the Regional Director.[2] The recommended relief included an interim bargaining order.

STANDARD OF REVIEW

The district courts "shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper." National Labor Relations Act §10 (j), as amended, 29 U.S.C. §160(j). The court "should rely on traditional equitable principles to determine whether interim relief is appropriate." Scott v. Dunn, 241 F.3d 652, 660 (9th

Cir. 2001). However, the court must bear " 'in mind that the underlying purposes of [the statute] are to protect the integrity of the collective bargaining process and to preserve the [Board's] remedial power while the Board resolves the unfair labor practice charge.' " Dunn, 241 F. 3d at 660 (quoting Miller v. California Pacific Medical Center, 19 F.3d 449, 452 (9th Cir. 1994)

To prevail on a petition for injunctive relief,

> the Regional Director must show 'either (1) a combination of probable success on the merits and the possibility of irreparable harm or (2) the existence of serious 'questions going to the merits, the balance of hardships tipping sharply in its favor, and at least a fair chance of success on the merits.

Dunn, 241 F.3d at 661 (quoting Senate of California v. Mosbacher, 968 F.2d 974, 977 (9th Cir. 1992). The required degree, of irreparable harm increases' as the probability of success decreases. Dunn, 241 F.3d at 661 (quoting United States v. Odessa Union Warehouse Co-op, 833 F.2d 172, 174 (9th Cir. 1987)). Further, as stated above, the court must make its determination while keeping in mind the purpose of §10(j). "The Board's ability to meaningfully adjudicate disputes arising within its jurisdiction must be balanced against the respondent's showing of hardship." Dunn, 241 F.3d at 661.

DISCUSSION

In the present case, the ALJ found that respondent committed the following unfair labor practices:

1) granting the distribution employees a wage increase at the same time the Union was organizing those employees in violation of. Section 8 (a) (1) of the NLRA;

2) soliciting employees' grievances on June 1, 2000, in

violation of Section 8 (a) (1) of the NLRA;

3) soliciting employees to withdraw their union authorizations in violation of Section 8 (a) (1) of the NLRA;

4) creating an impression of surveillance of employee activities in violation of Section 8(a) (1) of the NLRA; and,

5) discriminatorily discharging Kama Cox (a union organizer) on June 13, 2000, in violation of Section 8(a) (1) and (3) of the NLRA.

This decision by the ALJ adds considerable weight to the probability the Regional Director's success on the merits0. Even respondent has acknowledged this obvious fact. However, in spite of the ALJ's decision, respondent has continued to argue that the record cannot support a finding that the signatures on the authorization cards and petition were properly authenticated by the petitioner, and that signatures on a -petition (as opposed to authorization cards) cannot be counted at all for the purpose of authorizing union representation. For the reasons stated below, I reject respondent s 'contentions.

First, there is evidence in the record to support the ALJ's finding that the signatures were properly authenticated.[3] The ALJ was able to judge the credibility of those witnesses who described the petition signing, and to determine whether any of their testimony was inconsistent Or unworthy of belief.

Respondent also argues that only signatures on authorization cards can be counted to determine majority status, and signatures on a petition must be disregarded as a matter of law. However, in National Labor Relations Board v. Gissel Packing Co., 395 U.S. 575 (1969), the Supreme Court held that "employees should be bound by the clear language of what they sign." Gissel, 395 U.S. at 606.

In this case, the language on the petition was clear and unambiguous.[4] Respondent has offered no basis to

differentiate clear and unambiguous language contained on an authorization card from identical language contained on a petition.[5]

Respondent also argues that the court should not enter an interim bargaining order, even if other temporary relief is granted. In Dunn, the Ninth Circuit addressed a circumstance very similar to this case and reversed a district court order denying an interim bargaining order. While noting that "a bargaining order is an extraordinary and disfavored remedy, . . . [the decision] turns on the effect of the alleged unfair labor practices on a subsequent representation election." Dunn, 241 F.3d at 664. In Dunn, as here, the respondent granted a wage increase which could be viewed as "a 'hallmark' violation of the NLRA and . . . as 'highly coercive'." Dunn, 241 F3d at 666 (quoting National Labor Relations Board v. Jamaica Towing, Inc., 632 F.2d 208, 213 (2nd Cir. 1980). The wage increase in this case, coupled with the other alleged unfair labor practices, provides at least as much support for a bargaining order as was present in Dunn. This court

> will not require the Union to engage in a new round of organizing to rebuild its support. . . . The Union should not bear the burden of recovering from the company's illegal activities. The [respondent] should not "profit through the delay that [administrative review entails: all during this litigation it has not had to bargain collectively over wages or other financial aspects of employment."

Dunn, 241 F.3d at 668 (quoting International Union of Electrical, Radio, & Machine Workers, AFL-CIO v., National Labor Relations Board, 426 F.2d 1243, 1250 (D.C. Cir. 1970)

Respondent has presented no credible argument that an interim bargaining order would cause it any hardship. The "cost of time and money involved in bargaining with the Union, which might not ultimately. be certified . . . [,] cannot defeat an interim bargaining order." Dunn, 241 F.3d at 669.

Further, respondent's inability now to contest the composition of the bargaining unit is a loss that the ALJ found was occasioned by its own conduct. The "'most elementary conceptions of justice and public policy require that 'the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. '" Dunn, 241 F.3d at 669 (quoting International Union, 426 F.2d at 1251)

CONCLUSION

Respondent's Motion (#29) for Leave to File a Supplemental. Response is denied. The Petition (#1) for Injunction is granted.

DATED this 1st day of May, 2001.

Thomas M. Coffin
United States Magistrate Judge

Footnotes

[1] Respondent has also filed a Motion (#29) for Leave to File Supplemental Response. The proposed response contains no case law or argument that is not already contained in the record. Therefore, respondent's Motion (#29) is denied.

[2] The ALJ's Decision is attached as exhibit 1, and is hereby incorporated by reference.

[3] Fed.R.Civ.P. 901 requires "evidence sufficient to support a finding that the matter in question is what the proponent claims." The rule then gives a list of methods of authentication, but the list is specifically for "illustration only, and not by way of limitation." Therefore, the rule gives the court some latitude.

[4] The petitions contained the following statement: "The undersigned hereby authorize the International Brotherhood of Teamsters, Local Union No. 206 as their representative to bargain collectively with their employer Oh their behalf and to negotiate agreements concerning wages, hours, and all

other conditions of employment." (General Counsel's exhibits 2 and 3, proceedings before Albert A. Metz, December 4 - 6, 2000).

[5] At oral argument, respondent urged the court to presume that a person who signs a petition does not read the petition, but only looks at the other names already appearing on the petition. However, respondent could offer no case law to support such a presumption.

National Labor Relations Board
Division of Judges
San Francisco, California

THE GUARD PUBLISHING COMPANY, D/B/A THE REGISTER GUARD, RESPONDENT

AND

TEAMSTERS LOCAL UNION NO. 206, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO, CHARGING PARTY UNION
Cases 36-CA-8721
36-CA-8759
JD(SF)-23-01
Eugene, OR
April 5, 2001

Linda J. Scheldrup, Esq., for the General Counsel

William H. Bruckner, Esq., and Glen Plosa, Esq., for the Respondent

David A. Rosenfeld, Esq., and Stefan Ostrach, for the Charging Party Union

DECISION [FN1]

Albert A. Metz, Administrative Law Judge. This case involves issues of whether the Respondent has violated Section 8(a)(1), (3) and (5) of the National Labor Relations Act (Act). [FN2] On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the parties' briefs, I make the following findings of fact.

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The Respondent, an Oregon corporation, is engaged in the business of publishing newspapers. The Respondent operates a facility in Eugene, Oregon and employs approximately 400 persons at this location. Most of the Respondent's Eugene employees are represented by unions but the distribution department employees are not.

The Respondent admits, and I find, that the following individuals were its supervisors and agents at the times relevant to this case: Alton F. (Tony) Baker III, Editor and Publisher; R. Fletcher Little, General Manager; Cynthia Walden, Human Resources Director; Thomas Strub, Distribution Department Manager; Steve Carlson, Supervisor; and Jerry LaCamp, Supervisor.

III. APPROPRIATE UNIT

The Government's complaint alleges that the following unit is appropriate for collective bargaining purposes within the definition of Section 9(b) of the Act:

All distribution employees employed by the Employer at its Eugene, Oregon location; excluding office clerical employees, transportation helpers, bundle haulers, professional employees, guards and supervisors as defined in the Act.

The Board conducted a stipulated election in this unit in

1995. The Respondent signed that stipulation. The record supports the conclusion that the distribution employees have continued since 1995 to perform the same work under basically the same supervision. They are a distinct work group within the Eugene facility. Distribution employees occupy job classifications of technical support employees, core employees, and additional employees. Their work relates to counting, putting inserts in the newspapers, bundling and stacking. The papers are then forwarded to transportation helpers whose job it is to see that the newspapers are placed on the trucks of independent contractors for distribution. Transportation helpers work in the circulation department that is represented by a different union. The Respondent's other production employees are also represented by other labor organizations.

The Respondent denies the appropriateness of the distribution department unit but does not specify its objections to the unit. The Respondent does not urge that any other unit is the appropriate unit. I find, based on the record as a whole, that the described distribution department unit is an appropriate unit for purposes of collective bargaining under the Act. **Overnite Transportation Co., 322 NLRB 723 (1996)**; **NLRB v. Carson Cable TV, 795 F.2d 879 (9th Cir. 1986)**.

IV. MAJORITY STATUS

The Respondent argues that the Union was never legitimately authorized by a majority of the distribution department employees to be their collective bargaining representative. As of June 1, 2000, there were 60 employees in the distribution unit. The Government asserts that the Union obtained majority support by June 1 because on that date 41 of the 60 unit employees had signed petitions authorizing the Union to bargain for them.

In May 2000 some of the distribution employees contacted

the Union about obtaining union representation. Approximately 25 of these employees met with union representative Stephan Ostrach on May 30. Ostrach told the employees that his organization had sought to represent the distribution employees in 1995 but had ultimately lost a Board conducted representation election. Ostrach emphasized to the employees that in order to consider proceeding with another organizational effort the Union would need 70% of the distribution employees to sign authorization petitions.

Ostrach told the employees to sign the petitions if they wanted the Union to represent them. The following twenty-four employees signed petitions at the union meeting: Troy Amburn, Bradley E. Barnhart, Marcus Bladow, Clarence Copple, Kama Cox, Michael R. Dorman, Tom Dorman, Jason Fairchild, Manuelito Go, Shawn Hand, Stephen Kucera, Andy Kumler, Jeff Kumler, June Kundert, Adam McCabe, Shari Millican, Fernandita Nichols, Jason Picraux, Mike Primrose, Blake C. Schwab, Miguel C. Singson, George Szuatsek, Shiella May Troyo, and Robert Warner. I find that the signatures of these twenty-four employees were properly authenticated and shall be counted in determining the Union's majority status.

The petitions were then taken to work by some of the employees to obtain additional signatures from fellow workers. The Respondent's brief argues that some of the employees who subsequently signed the petitions did so, "... believing that they were only authorizing a vote on whether to be represented by the Teamsters because of the representations made by the persons who solicited their signatures...." The Respondent's brief is limited as to specifics in support of that argument, but does state, "Union adherents repeatedly told employees that the signing of the petition was just to get a vote. In fact, Marcus Bladow testified that he told employees to ignore the language on the petition." The Government asserts that the subsequent petition signers were not misled by statements of solicitors and that the signers are bound by the printed language at the top of the petitions.

The petitions the distribution employees signed are headed with the following language:

The undersigned hereby authorize the International Brotherhood of Teamsters, Local Union No. 206 as their representative to bargain collectively with their employer on their behalf and to negotiate agreements concerning wages, hours, and all other conditions of employment.

The Board has previously held, with court approval, that such petitions are unambiguous, single-purpose authorization petitions. **Ona Corp. v. NLRB, 729 F.2d 713, 723-724 (11th Cir. 1984)**.

In **NLRB v. Gissel Packaging Co., 395 U.S. 575, 606-607 (1969)**, the Supreme Court stated the following regarding union authorizations:

...[E]mployees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. There is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election....

The Board set forth its views on the same subject in **DTR Industries, 311 NLRB 833 (1993)**:

Thus, where the card on its face clearly declares a purpose to designate the union as collective-bargaining representative, the only basis for denying face value to the authorization card is affirmative proof of misrepresentation or coercion. **Levi Strauss & Co., 172 NLRB 732, 733 (1968)**. In Levi Strauss, the Board explained and reaffirmed the **Cumberland Shoe doctrine (144 NLRB 1268 (1963)**, enf. **351 F.2d 917 (6th Cir. 1965)**) in the context of unambiguous, single-purpose authorization cards. The Board stated:

Declarations to employees that authorization cards are desired to gain an election do not under ordinary circumstances constitute misrepresentations either of fact or

of purpose. As in the instant case, where the Union did use the evidence of employee support reflected by the cards to get an election, such declarations normally constitute no more than truthful statements of a concurrent purpose for which the cards are sought. That purpose, moreover, is one that is entirely consistent with the authorization purpose expressed in the cards, as well as with the use of the cards to establish majority support. A point sometimes overlooked is that in basic purpose there is no essential difference between cards that are needed for a showing of interest to gain an election and cards that must be used to support a majority designation showing in a Section 8(a)(5) complaint proceeding....

Regarding the challenged authorizations in the present case, the record shows that subsequent to the May 30 union meeting employee Shiella Troyo solicited fellow workers James Gray, Chris Munoz, Abe Huerta-Guzman, Sam Plesner, Dan Plesner, and Amber Plant, to sign the Union's representation petitions. **[FN3]** Troyo witnessed them all sign the petition. Troyo testified that she told the employees, "if you sign the petition, that you are saying ...that you would like the Union to represent you, also added as a vote to get a union into the building." Troyo testified that she never told anyone that she solicited to ignore the written heading on the petition.

James Gray testified that Troyo did not tell him signing had anything to do with getting a vote, but rather, "She said we had to get everything filled out before we could see how many people would go for a union there." Gray's testimony also authenticated his own signature on the petition. I find that Gray's signature shall be counted in determining the Union's majority status.

Munoz and, Guzman did not testify and no evidence was presented to attack the authenticity of their signatures. The signatures of Guzman and Munoz were placed on the petition between signatures dated May 30 and June 1. I find that they signed the petition no later than June 1. As discussed in detail

below, on June 1 the Respondent announced raises for unit employees. Thereafter, Munoz and Guzman requested that their names be removed from the petition. Based on my findings set forth infra that the raise announcement is an unfair labor practice, I find that the revocations of the signatures of Munoz and Guzman were ineffective in eliminating their being counted for determining the Union's majority status. **Dlubak Corp., 307 NLRB 1138, 1138 fn. 2,** enfd. **5 F3d 1488 (3rd Cir. 1993)**. Considering Troyo's unrebutted testimony regarding their signing of the petitions, I find that the signatures of Munoz and Guzman shall be counted in determining the Union's majority status.

Dan Plesner testified Troyo told him "it's a petition to get enough signatures to get–to have a vote. You know what I mean? It wasn't a vote. It was a petition to get enough people to vote. Supposedly we had to have two-thirds of that department in order for us to get a chance to vote." When asked about the two-thirds, he responded "who wanted the union or who was interested in the union." I find that, even crediting Dan Plesner's version of what was said to him, he was not told, either explicitly or in substance, that the petition would be used only or solely for an election or vote. I find that Dan Plesner's signature shall be counted in assessing the Union's majority status. **NLRB v. Anchorage Times, 637 F.2d 1359, 1368-1369 (9th Cir. 1981)**.

Sam Plesner testified Troyo asked him, "Do you want to sign so we can get a vote for the union, basically." Sam Plesner's demeanor and testimony demonstrated his confusion as to the purpose of the petition. Considering the credited testimony of Troyo as to what she told persons that she solicited for signatures, and Sam Plesner's testimony which did not state that he was told the only purpose of the petition was to secure a vote, I find that his signature shall be counted in determining the Union's majority status.

Amber Plant testified that she supported the Union and read the heading at the time she signed the petition. She also testified that there was a discussion about getting a vote at

the same time. It is clear that Plant supported the union when she signed and that nothing was told to her that would invalidate the language that stated the purpose of the petition. I find that Plant's signature shall be counted in determining the Union's majority status.

David Meeks testified that employee Marcus Bladow solicited him to sign the petition. Meeks read the petition before he signed and recalled being told by Bladow that he should sign if he was interested in bringing in the Union. I find that Meeks' signature shall be counted in determining the Union's majority status.

Brian Adkisson testified that he was not asked to sign the petition, but, "I signed it." He further testified that he could not remember if he read the petition before signing. Adkisson recalled discussing the petition with employee Bradley Barnhart who had presented it to him. He remembered Bradley saying the petition was for a vote for the Teamsters Union. I find Adkisson was not told that his signature was for a purpose contrary to the stated purpose of the petition. I find his signature shall be counted in determining the Union's majority status. It is noted that Adkisson subsequently asked that his signature be removed from the petition after he received a wage increase from the Respondent.

Daniel Black authenticated his signature on the petition. He testified that he supported the Union at the time he signed and that he was told that the purpose of the petition was "to bring forth some sort of election or something to decide if the distribution crew was going to have a union or not." I find that Black's signature shall be counted in determining the Union's majority status.

John "Richie" Carr authenticated his signature on the petition. He testified that he read it when he signed, and that he was told the petition was "... supposed to be signed to see if we could vote for - - see if the union will represent us." I find that Carr's signature is valid and shall be counted in determining the Union's majority status.

Cecilia Winzer testified that she signed the petition after being told, "they said that they were trying to get signatures to see if there was enough people for the Union." I find that Winzer's signature shall be counted in determining the Union's majority status.

Andy Kumler was originally a supporter of the Union. He subsequently was given a $2.20 per raise by the Respondent. He thereafter asked that his name be removed from the petition. Kumler testified that he solicited signatures from several employees. All but one of the employees in question that he solicited (Cecilia Winzer, John Richie Carr, and Brian Adkisson) authenticated their own signatures. The exception is Wendy Sprenger who did not testify at trial. I have already found the signatures of Winzer, Carr and Adkisson are valid. Kumler testified at one point that he told employees that signing the petition was "only to get a vote." In contrast, on direct examination he testified "I told them that it was a petition to have a vote–if we had enough signatures, then to show the union that there was enough interest and we would have a vote to have them be our collective bargaining [representative]." He did not specifically testify as to what, if anything he told Sprenger when she signed the petition in his presence. I found Kumler to be a vacillating and unsure witness. Based upon his admission that he told employees that the purpose of the petition was to "show the union that there was enough interest" and "have them be our collective bargaining" representative, I find that the Respondent has failed to carry its burden of demonstrating that Sprenger's signature should be invalidated. **Photo Drive Up, 267 NLRB 329, 364 (1983)**("It is the Respondent who must show clear and convincing evidence of material misrepresentations to invalidate otherwise unambiguous authorization cards."); Waste Management of Utah, Inc., 310 NLRB 907, 910 fn. 128 (1993); **NLRB v. Gissel Packaging Co., 395 U.S. 575, 584 (1969)**(Authorization signatures will be counted, "...unless it is proved that the employee was told that the card was to be used solely for the purpose of obtaining an election....[Emphasis in original.]) I find that Sprenger's signature shall be counted in determining the Union's

majority status.

Marcus Bladow solicited the signatures of Adam Bacon, Mike Crow II, Mathew Pearson, Nathan Ramirez, and Jennifer Stephenson. Bladow testified that he had a general statement he made to some persons he solicited to sign the petition. He recalled saying, "this is to organize a vote for the Register-Guard to see if we want a union." Bladow recalled some employees simply signed the petition without him having to say anything. Other, unspecified persons, questioned him about signing because they read the petition to mean that signing was an affirmation they wanted the Union. Bladow testified he would tell these persons, "No, this is not a vote. This was to bring in the vote.... We have to have so many signatures even to get the vote." The authenticity of the signatures of the above-named persons that Bladow talked to are not questioned. The Respondent presented no evidence that any of these individuals were the persons with whom Bladow discussed an election. Nor does the record as a whole reflect that Bladow's statements concerning an election overrode the clear language in the heading of the petition. In sum, I find that the Respondent did not meet its burden of showing by clear and convincing evidence that the signatures of Bacon, Crow, Pearson, Ramirez and Stephenson should not be counted in determining the majority status of the Union. Photo Drive Up, supra. I find, therefore, that their signatures shall be counted for such purposes.

In summary, I find that on June 1, 2000, the Union had obtained 41 valid signatures on the authorization petitions from Respondent's 60 distribution center employees. The authorization petitions contained the above-quoted unambiguous representation language. I find, therefore, that the Union was the majority representative of the unit employees as of June 1, 2000.

V. WAGE INCREASES AND OTHER ALLEGED UNFAIR LABOR PRACTICES

A. Background regarding wage increases

Employee Andy Kumler testified that in April 2000 he asked Distribution Center Manager, Tom Strub, about possible wage increases. Strub told him that wage increases were "in the workings" and he would pass along the employees' wage concerns to supervisor Jerry LaCamp. Employee Bradley E. Barnhart testified that he had met with Human Resources Manager, Cynthia Walden, and LaCamp, approximately the middle of the week prior to the May 30 union meeting. Barnhart described how he had complained to Walden and LaCamp that the distribution employees had not yet received a wage increase. Walden told him that the Respondent was still conducting a survey and comparing wages with other companies. As noted above, starting on May 30 the employees began signing union authorization petitions.

B. Respondent's May 31 Letter

On May 31, Tony Baker, Respondent's Editor and Publisher addressed a letter to all of the unit employees. The letter stated that Baker had learned that a few employees had been talking about union representation and the Respondent:

...will oppose, by all lawful means, the organization of our Distribution Center employees by a labor union....

***

You voted down union representation a few years ago and I sincerely hope that we do not have any election this year."

***

If you have made a mistake by signing a [union authorization] card you have the right to ask for the card back or to withdraw your signature. If you have not signed anything I urge you not do so.

Its also come to my attention that Guild officers (a union representing another unit of Respondent's employees) and retirees are encouraging you. Be smart. The Guild contract has expired and those employees have had no pay raise for two years. Don't let yourself be 'used.'

I thought it would be helpful for you to know my feelings on this issue.

C. Respondent's June 1 Employee Meeting

On June 1 the Respondent held a meeting with the distribution employees. Tony Baker conducted the meeting and General Manager, R. Fletcher Little, Jerry LaCamp and Cynthia Walden were also present. The Respondent has historically held meetings with the distribution department employees at irregular intervals.

Barnhart testified about the events preceding the meeting and what occurred during the meeting. I found Barnhart to be a witness who accurately described what he observed without embellishment. His demeanor was persuasive and I credit his testimony regarding what took place during the June 1 employee meeting. Other employees also testified to what happened during the meeting. Their testimony was generally consistent with Barnhart's description of the event. To the extent that their testimony conflicts with Barnhart, I credit Barnhart's testimony of what took place. None of the Respondent's supervisors testified at the hearing.

Barnhart recalled he first learned of the meeting when he was at work on May 31. He asked supervisors Dirk Winters, Clayton Johnson, and Rex Loy what the meeting was about. They all responded that it may have something to do with the union effort.

Barnhart testified that the June 1 meeting commenced with Walden discussing overhead projections that outlined wage increases over a five-year period in the distribution department. Another transparency contrasted the wage increases of the distribution department with the other departments in the plant that are represented by unions. The Government subpoenaed all such overhead transparencies. The Respondent produced only one, stating it was the single item that could be located. That transparency showed the raises the distribution employees had received effective January 31, 1999. (G. C. Exh. 14) Walden announced to the employees that they were going to be receiving wage increases effective June 11.

The Respondent's history of granting wage increases to distribution center employees and the raises announced on June 1, 2000, are set forth in the following table:

CREW MEMBER

DATE EFFECTIVE	BEG. SCALE	% CHANGE	TOP SCALE	% CHANGE
3/20/94	$6.20		$8.15	
3/19/95	$6.45	4.03%	$8.40	3.07%
1/14/96	$7.00	8.53%	$10.90	29.76%
NO RAISE IN 1997				
2/8/98	$7.30	4.29%	$11.25	4.81%
1/31/99	$7.50	2.74%	$11.55	2.67%
6/11/00 [FNa1]	$7.95	6.00%	$12.55	8.66%
6/11/00 WITH NIGHT PAY	$8.20	9.33%	$12.80	10.82%

TECHNICIAN

DATE EFFECTIVE	BEG. SCALE	% CHANGE	TOP SCALE	% CHANGE
3/20/94	$7.10		$9.35	
3/19/95	$8.16	14.93%	$10.75	14.97%
1/14/96	$9.53	16.79%	$13.40	24.65%
NO RAISE IN 1997				
2/8/98	$9.90	3.88%	$13.90	3.73%
1/31/99	$10.20	3.03%	$14.30	2.88%
6/11/00 [FNa1]	$12.90	26.47%	$15.65	9.44%
6/11/00 WITH NIGHT PAY	$13.15	28.92%	$15.90	11.18%

FNa1. Plus $.25 per hour night pay shift differential (Approximately 55 of the 60 unit employees work on the night shift.)

Barnhart asked why in previous years the raises had been granted in January and February, but when the employees started talking about union representation they received a raise in June. Walden answered that it took a long time to do the wage survey.

The Respondent's Human Resources Administrative Assistant, Vickie LeBlanc, testified regarding the wage increases. In sum, she related that the wage survey was delayed in 2000 because the human resources department was occupied with other matters (another bargaining unit's retirement issues, open enrollment of a medical plan, a workers compensation case, and FLSA litigation.) The Respondent offered no evidence about the details of a wage survey or the timing and the amount of the raises given distribution center employees.

After Walden discussed the raises Baker talked with the employees about concerns they had. No agent of the Respondent testified about what was said at the June 1 meeting. The employees' testimony shows that the Respondent did not promise to solve the issues raised, Baker did, however, state that he would look into the concerns expressed.

Employees had questions concerning the need for drug testing, "additional" employees (limited-hours employees) getting more hours of work than full-time employees, and the issue of training. Barnhart explained that training was a concern of employees because the more training a person received the higher his wage level. The issue of getting more "core" positions was also raised (core employees receive company benefits). Another employee asked why the employees at this meeting were being served pizza and sodas, since the last time that had happened was when the employees had been engaged in union activity. The record reflects that employees had received refreshments at other employee meetings.

D. Baker's June 7 Letter

On June 7 Baker sent another letter to the distribution employees in which he noted that employees had raised several issues at the June 1 meeting. Baker's letter particularly mentioned the issues of training and core positions and states that Distribution Manager, Tom Strub, would be looking into those concerns. Baker's letter again emphasized his position on union organization: "I want to reiterate that I believe a union in the distribution center is not in your best interest or in the Company's best interest. Creating a union between you and the management of this Company will not assure you of any more or any faster response to your concerns...." The letter concludes by noting that a suggestion form is enclosed and invites the employees to submit their "thoughts" and "concerns" to the Respondent.

About a week after the June 1 meeting the Respondent met with employees to discuss employee concerns. Barnhart testified that he met with supervisors Tom Strub and Jerry LaCamp who discussed with him the possibility of creating additional core positions for employees. Shortly after the June 1 meeting the Respondent created two additional technical support positions. Two core employees were promoted to fill these positions, which in turn opened those positions to two additional employees.

E. Baker's June 16 Letter

Baker sent another letter to the distribution unit employees on June 16. In this communication Baker states that he has learned that some employees have told supervisors they were having problems getting their names removed from the union authorization petition. Baker advised them of their right to have their names removed. He also states that the Respondent's agents were not going to pressure the employees to withdraw their signatures. He did enclose a form letter which employees could use to revoke their authorizations.

F. Analysis of Wage Increases

The Supreme Court has interpreted Section 8(a)(1) of the Act to prohibit "conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect." **NLRB v. Exchange Parts Co., 375 U.S. 405, 409 (1964)**. The Court also stated that the "The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove," and "Employees are not likely to miss the inference that the source of benefits now is also the source from which future benefits must flow and which may dry up

if it is not obliged." Accord, **NLRB v. Anchorage Times, 637 F.2d 1359, 1367-1368 (9th Cir. 1981)**.

In **Wm. T. Burnett & Co., 273 NLRB 1084, 1091 (1984)**, the administrative law judge, with Board approval, set forth the presumptions regarding wage increases during the pendency of an organizing drive:

Thus, an employer's grant of benefits during the course of union activity has a substantial potential for impacting upon and interfering with such activity. An employer's course in granting benefits in such situations must be charted to avoid the perception that the grant of benefits is responsive to union activity. Because of the obvious impact on employees of the grant of a benefit during a union election campaign, the granting of such benefits raises a strong presumption of illegality. More specifically, the presumption is that the employer's motive in granting the benefit is to influence employee choice in union representation. In view of this presumption, the burden is that of the employer to show that the grant of the increase was unresponsive to the organizational activity.

The Respondent's May 31 letter to employees acknowledged that it was aware of their union activities. The record reflects that the Respondent had been studying wages in connection with the distribution employees but there is no evidence to sustain a finding of what that survey revealed. Thus, the Respondent presented no evidence relative to who did the wage survey, what information the survey sought, when it was conducted, when it was finalized, what the survey results showed, how the amounts of increases were calculated and who made the decision regarding the amount and timing of the increases. Additionally, the Respondent did not provide evidence regarding the reasoning and timing of the granting, for the first time, of a night differential for the distribution center employees. The Respondent simply chose not to call any witnesses concerning these questions. The Respondent bears the burden of proving these matters when wage increases are given to employees immediately upon learning of their union activity.

I find that the record shows the amounts of the June 1 hourly increases were substantial, particularly when compared to prior wage increases. The timing of the increases was not consistent with past raises. No evidence demonstrates that the raises were decided upon prior to the Respondent's knowledge of the employees' union activities. The $ .25 per hour night shift differential was a new benefit that applied to approximately 55 of the 60 unit employees. Thus approximately 91% of the distribution employees received this additional pay raise. The Respondent's bare assertion that raises were delayed because the Human Resources department was busy does not meet its burden of showing by definitive evidence that the raises were not designed to interfere with the employees' union activities. The Respondent did not provide adequate evidence sufficient to overcome the presumption that it was granting wage increases and a night shift differential increase, at least in part, to unlawfully curtail the Union's organizational campaign. I find, therefore, that the grant of these wage increases is a violation of Section 8(a)(1) of the Act.

G. Analysis of Promises of Benefits

The Government alleges that on June 1, Baker's statements to employees amounted to unlawful solicitation of grievances in order to interfere with their union activities. The Respondent asserts that no promises were made to remedy any of the employees' complaints and thus the Respondent did not violate the Act.

The relevant principles regarding the solicitation of grievances are well established and were recently summarized in **Maple Grove Health Care Center, 330 NLRB No. 121, slip op. at 1** (2000), as follows:

Absent a previous practice of doing so ... the solicitation of grievances during an organizational campaign accompanied by a promise, expressed or implied, to remedy such grievances violates the Act. [I]t is the promise, expressed or

implied, to remedy the grievances that constitutes the essence of the violation. [T]he solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. Furthermore, the fact an employer's representative does not make a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved. [T]he inference that an employer is going to remedy the same when it solicits grievances in a preelection setting is a rebuttable one.

The Respondent not only made statements promising to look into the employees' grievances, it also followed up by meeting with workers and sending the June 7 letter that was a further solicitation regarding their concerns. The Respondent presented insufficient evidence that rebuts the inference that it was going to remedy the employees' grievances and that such solicitations were designed to interfere with the employees' union activities. I find that the Respondent violated Section 8(a)(1) of the Act by soliciting the employees' grievances on June 1, 2000. **Reliance Electric Company, 191 NLRB 44, 46 (1971)**.

H. Additional 8(a)(1) Violations

The Government alleges that the Respondent has committed several other violations of the Act regarding its campaign against the Union. The Respondent denies that it has violated the Act with regard to the additional allegations.

One such allegation asserts that the Respondent's letters of June 7 and June 16 unlawfully solicited the employees to withdraw their union authorizations. The Board in **R. L. White, Inc., 262 NLRB 575, 576 (1982)**, set forth the standard for considering an employer's conduct regarding telling employees about resigning from the union. The Board stated that an employer does not violate the Act by merely providing employees with information on how to resign from

the union "as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance, or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation." The Board has found violations where unrequested advice about revoking union authorizations has been accompanied by employer assistance in the actual mechanics of the revocation, **Deutsch Co., 180 NLRB 8, 20 (1969)**, and where the advice was given in the context of other unfair labor practices. **Kut Rate Kid & Shop Kwik, 246 NLRB 106, 119 (1979)**; **L'Eggs Products, Inc., 236 NLRB 354, 389 (1978)**. Here the Respondent offered the revocation advice in accompaniment with its unlawful granting of wage increases, solicitation of employee grievances. and as detailed below, the unlawful discharge of Kama Cox. I find that, in the context of its unlawful conduct, the Respondent's soliciting the employees to withdraw their union authorizations was a violation of Section 8(a)(1) of the Act.

The Government alleges that the June 7 and June 16 letters also unlawfully created the impression of surveillance of employees' union activities. In the June 7 letter Baker stated: "I am encouraged that some employees have already requested that their union signature cards be withdrawn." In the June 16 letter, Baker stated: "Several Distribution Department employees have shared with their supervisors that those pushing the union petition have refused to remove their signature at their request." The statement contained in the June 16 letter does nothing more than report what employees told supervisors. I find that this statement does not unlawfully create the impression of surveillance of employees' union activities. In contrast, the statement in the June 6 letter cites no source for Baker's knowledge that some employees had requested their signatures be withdrawn. This tends to restrain and coerce employees by reasonably giving them the sense that their union activities are being surveilled by the Respondent. I find, therefore, that the June 6 letter did create the impression of surveillance and is a violation of Section 8(a)(1) of the Act.

Finally, the Government alleges that by serving pizza to the employees at the June 1 meeting the Respondent was further trying to unlawfully interfere with their union activities. The record establishes that the Respondent had provided refreshments to employees at past meetings. While the Government debates the comparative quality of those refreshments, I find that the Respondent's serving of pizza at the June 1 meeting was not unlawful interference, and the Respondent did not violate the Act by such conduct.

VI. THE DISCHARGE OF KAMA COX

Kama Cox worked for the Respondent on two occasions. She was first employed from September 21, 1999 to January 19, 2000 as a part-time additional employee. Cox is a single mother and was attending school while working for the Respondent. She admittedly had some problems working the night shift while at the same time meeting her family and school responsibilities. Cox was not warned or disciplined about any attendance problems during her first period of employment. Cox voluntarily resigned her employment on January 19, 2000.

In April 2000 Cox again sought employment with the Respondent. She was immediately hired and started work on April 6. Cox was active in the union organizing activity. She signed the union authorization petition, was on the union organizing committee, attended union meetings and actively solicited employees to sign the authorization petitions.

On June 3, Cox called in sick with a severe allergy/asthma attack. On June 5, Cox telephoned supervisor Steve Carlson and reported that she was unable to get a doctor's appointment until 2:00 p.m. the following day and would need to leave work early. Cox testified that Carlson said she could not leave work early because they had a "run" (apparently this is an extra load of work.) Cox argued there was no run on the schedule and they never had runs on Tuesdays.

Carlson told Cox she could work the whole day or she could take the whole day off. Cox said that she needed to get to the doctor and would take the entire day off.

On June 6 Cox telephoned the Respondent's Human Resources Department and asked about its policy regarding employees leaving work early. She was told to talk to supervisor LaCamp. Cox asked LaCamp about her question and he told her that he did not know of any policy on the subject. He stated that he thought such matters were left to the supervisor's discretion. Cox complained to LaCamp about Carlson denying her permission to leave early for the doctor's appointment. LaCamp told her to take the matter up with her manager, Strub, when he returned from vacation the following week.

Cox testified that she knew that other employees had been allowed to leave work early for medical appointments and cited the example of employee Rob Warner leaving early for a dental appointment. Carlson did not testify at the hearing and the Respondent offered no evidence relating to his refusal to allow Cox to leave work early for the medical appointment. The Respondent offered no evidence relative to any policy about leaving work early.

On June 6 Cox went in to the Respondent's facility to give Carlson a note from her doctor and to pick up her paycheck. At that time Cox learned that, contrary to Carlson's stated reason for not allowing her to leave early, there had been no run performed on June 6. Cox's testimony in this regard was uncontroverted by the Respondent.

On June 7 Cox was called at work by her son's day care provider and informed that he was ill. Carlson gave Cox permission to leave work to get her son. On June 8 Cox telephoned Carlson and notified him that her son was still ill and she would not be at work that day. Her son's illness continued on June 9 and again she telephoned Carlson to inform him she would be absent from work that day. Carlson told her he would see her on Tuesday, June 13, her next

scheduled workday.

On June 10 union representative Ostrach mailed invitations to unit employees for a "bring your own pizza" party to be held on June 14 at the Union hall. The invitation listed the names of the five employee organizing committee members. Cox's name was one of the five listed. The record reflects that the invitations were delivered to employee homes on June 12.

Cox went to work as scheduled on Tuesday, June 13. When Cox got out of her car in the parking lot she was met by supervisors Carlson and Strub. Cox started to hand Strub the doctor's excuse reflecting her son's illness, but he refused to accept the note. The men told Cox that she was being discharged because she had failed her probationary period. Cox was not told what she had done to fail her probationary period.

Cox candidly admitted that she was occasionally late to work. Cox's personnel file contained no warnings about potentially failing her probationary period and no absences in the file were unexcused or a "no call/no show" absence. Cox testified that the Respondent had never warned her that she was in danger of losing her job. Neither Carlson nor Stub testified at the trial. The Respondent offered no witnesses to state the Respondent's decision making process or specific reasons why Cox was terminated.

No evidence was presented that the Respondent has a written policy concerning the number of absences or tardies that an employee is allowed before she is warned or disciplined. The record contains several examples of employees who were absent or tardy on numerous occasions, including having unexcused absences and "no call/no show" absences. These employees were not disciplined or terminated. The Respondent offered no evidence to refute these examples or to explain the disparity in treatment received by Cox. **[FN4]**

The General Counsel has the initial burden of establishing

that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support such a showing of discriminatory motivation are union activity, employer knowledge, timing, and employer animus. Once such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. **Wright Line, 251 NLRB 1083 (1980)**, enfd. **662 F.2d 899 (1st Cir. 1981)**, cert. denied **455 U.S. 989 (1982)**; approved in **NLRB v. Transportation Management Corp., 462 U.S. 393 (1983)**; **Electromedics, Inc., 299 NLRB. 928, 937 (1990)**, enfd., **947 F.2d 953 (10th Cir. 1991)**; **Presbyterian/St. Luke's Medical Center, 723 F.2d 1468, 1478-1479 (10th Cir. 1983)**. The test applies regardless of whether the case involves pretextual reasons or dual motivation. **Frank Black Mechanical Services, 271 NLRB 1302, fn. 2 (1984)**. "A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." **Limestone Apparel Corp., 255 NLRB 722 (1981)**, enfd. sub nom. **705 F.2d 799 (6th Cir. 1982)**.

Cox was a union organizing leader and this fact was widely known in the plant. The evidence shows that the Respondent was immediately aware of the union activity at the plant. Thus, Baker's May 31 letter states: "It has been brought to my attention that a few employees have been talking about representation by a Union." Cox's discharge occurred directly after her name appeared on the Union's meeting invitation. Cox was unexplainably denied permission to leave work early for a doctor's appointment shortly after her union activity began. Cox was presumably discharged for poor attendance, yet no specifics of how she failed to meet the Respondent's work standards was presented. The Respondent chose not to explain the disparate treatment that Cox received when compared to other employees with attendance deficiencies. The Respondent chose not to

introduce evidence explaining the reasoning and timing for her discharge. The Respondent chose not to introduce any evidence denying that it had knowledge of Cox's union activities. I infer from these factors and the record as a whole that the Respondent was aware that Cox was a leader in the union organizing efforts at the plant. **Dr Frederick Davidowitz, D.D.S., 277 NLRB 1046-1049 (1985)**; **Famet, Inc., v. NLRB, 490 F.2d 293 (9th Cir. 1973)**.

Under the adverse inference rule when a party has relevant evidence within its control which is not produced, that failure gives rise to an inference that the evidence would be unfavorable to the party. **Auto Workers v. NLRB, 459 F.2d 1329 (D.C. Cir. 1972)**. Such an adverse inference is appropriate in this case. I find that had the Respondent called witnesses to testify concerning its reasons for terminating Kama Cox that testimony would have been contrary to the Respondent's defense that it did not unlawfully discharge Cox because of her union activities. **International Automated Machines, 285 NLRB 1122-1123 (1987)**.

The Respondent, as set forth herein, has been found to have committed other unfair labor practices. I find, therefore, that the Government has proven the requisite union activity, knowledge, animus and timing with regard to the discharge of Kama Cox. I further find that the Respondent has failed to show that Cox would have been discharged regardless of her union activities. I conclude, therefore, that the Respondent discriminatorily discharged Kama Cox on June 13 in violation of Section 8(a)(1) and (3) of the Act.

VII. BARGAINING ORDER REMEDY

The Government argues that a bargaining order is the appropriate remedy for the Respondent's unfair labor practice violations. The Respondent opposes such a remedy. In Gissel, the Supreme Court "identified two types of employer misconduct that may warrant the imposition of a

bargaining order: 'outrageous and pervasive unfair labor practices' ('category I') and 'less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes' ('category II')." **Charlotte Amphitheater Corp. v. NLRB, 82 F.3d 1074, 1078 (D.C. Cir. 1996)**. The Supreme Court stated that in fashioning a remedy in the exercise of its discretion in category II cases, the Board "can properly take into consideration the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue." **395 U.S. at 614- 615**.

An examination of the Respondent's conduct in this case reveals that a Gissel bargaining order is justified. The Union had signed authorizations from a majority of the unit employees on June 1. The Respondent's unfair labor practices include the unlawful discharge of Kama Cox, a leading union advocate. As noted, her discharge was timed to occur the day before the Union's June 14 employee meeting. **NLRB v. Davis d/b/a Carlton's Market, 642 F.2d 350, 354 (9th Cir. 1981)**(employees are unlikely "to miss the point that backpay and offers of reinstatement made some 9 to 11 months after the discharge does not necessarily compensate for the financial hardship and emotional and mental anguish apt to be experienced during an interim period of unemployment"); **NLRB v. Jamaica Towing, Inc., 632 F.2d 208, 212-213 (2d Cir. 1980)**.

The Respondent's highest ranking official, Publisher, Tony Baker, was shown to have had a direct part in some of the unlawful activity including the announcement of the pay raises, creating the impression of surveillance of the employees' union activities, soliciting the employees to

withdraw support from the Union, and the solicitation of employee grievances. Baker commenced the Respondent's unlawful conduct immediately upon learning of the employees' union activities and voiced his strong hostility towards union representation for the distribution workers in the communications he transmitted to the employees. **M. J. Metal Products, 328 NLRB NO. 170, slip op. at 2** (1999); **Consec Security, 325 NLRB 453, 455 (1998)**, enfd. **185 F.3d 862 (3d. Cir. 1999)**("[w] hen the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten.")

The unlawful grant of the wage increases effected every unit employee and was a powerful weapon in the Respondent's antiunion campaign. As the Board stated in **Parts Depot, Inc., 332 NLRB No. 64, slip op at 6** (2000):

...[T]he effects of an unlawfully granted wage increase are particularly difficult to remedy by traditional means. Unlawfully granted benefits have a particularly long-lasting effect on employees and are difficult to remedy by traditional means not only because of their significance to the employees, but also because the Board's traditional remedies do not require a respondent to withdraw the benefits from the employees. **Color Tech Corp., 286 NLRB 476, 477 (1987)**. Further, the benefits unlawfully granted will serve as a reminder to the employees that the Respondent, not the Union, is the source of such benefits and that they may continue as long as the employees do not support the **Union. (Gerig's Dump Trucking, 320 NLRB 1017, 1017-1018 (1996)**, enfd. **137 F.3d 936 (7th Cir. 1998)**.) **[FN5]**

Finally, the Respondent committed other serious and pervasive unfair labor practices in its attempt to discourage support for the Union – creating the impression of surveillance of their union activities, unlawfully urging employees to revoke union authorizations, and solicitation of employee grievances. All of this conduct was directed against every employee in the unit. There is nothing in the record that suggests the Respondent would not continue to engage in

such widespread unlawful conduct in the future if it would suit its ends in defeating union representation of its employees.

Taking all of these factors into consideration, I find that the Respondent's unlawful conduct clearly demonstrates that the holding of a fair election in the future would be unlikely and that the employees' wishes are better gauged by the Union's card majority rather than by an election. **Sahara Datsun, Inc. v. NLRB, 811 F. 2d 1317, 1321-22 (9th Cir. 1987)**. I find that the bargaining order shall date from June 1, 2000, the date that the Respondent commenced its campaign of unfair labor practices. **Joy Recovery Technology Corp., 320 NLRB 356 fn. 4 (1995)**, enfd. **134 F.3d 1307 (7th Cir. 1998)**. **[FN6]**

VIII. THE UNION'S BARGAINING DEMAND AND INFORMATION REQUEST

On September 26, 2000, the Union's attorney, David A. Rosenfeld, sent a letter to Baker demanding that the Respondent bargain with the Union regarding the distribution department employees. The letter stated that the request was retroactive to June 1, 2000. Rosenfeld's letter also requested certain information regarding unit employees, company policies relating to wages, hours and working conditions, copies of fringe benefit plans, and current job descriptions.

On September 27, Baker replied to Rosenfeld's letter denying that the Union represented any of the Respondent's employees. Baker rejected the Union's request for bargaining and denied the request to provide the information sought. The Government alleges the refusal to bargain and provide the information is a violation of the Act. The Respondent asserts it had no duty to supply the information because the Union did not represent its distribution employees.

A bargaining order remedy has been directed against the

Respondent from the date of the commencement of its unfair labor practices, i. e., June 1. **Regency Manor Nursing Home, 275 NLRB 1261 fn. 5 (1985)**. Under Section 8(a)(5) and 8(d) of the Act, as interpreted by the Supreme Court, an employer is obligated to furnish a union with sufficient relevant information, on request, to enable the union to represent its employees effectively in collective-bargaining negotiations. **NLRB v. Acme Industrial Co., 385 U.S. 432, 435-436 (1967)**. I find that the Union's requested information is relevant and necessary to its collective-bargaining with the Respondent. The Respondent's September 27 refusal to recognize and bargain with the Union and to supply information is contrary to the bargaining order remedy. I find that the Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union and to provide it the requested relevant information.

CONCLUSIONS OF LAW

1. The Guard Publishing Company, d/b/a The Register Guard, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Teamsters Local Union No. 206, Affiliated with the International Brotherhood of Teamsters, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1), (3) and (5) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not violated the Act except as herein specified.

On these findings of fact and conclusions of law, and on the

entire record, I issue the following recommended: [FN7]

ORDER

The Respondent, The Guard Publishing Company, d/b/a The Register Guard, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Terminating, disciplining, and/or taking any other adverse actions against employees because they engage in activities in support of Teamsters Local Union No. 206, affiliated with the International Brotherhood of Teamsters, AFL-CIO, or any other labor organization, or engage in protected concerted activities.

(b) Providing increased benefits to employees to encourage them to refrain from supporting and/or assisting the union.

(c) Soliciting complaints and grievances and thereby implying that Respondent will provide improved benefits to employees if they refrain from supporting and/or assisting the Union.

(d) Creating the impression of surveillance of employees' union activities.

(e) Soliciting employees to withdraw their signatures from the Union's petitions.

(f) Refusing to bargain with Teamsters Local 206 as the exclusive collective-bargaining representative of employees in the unit listed below.

(g) Refusing to provide the Union with necessary and relevant information it requests for the conduct of its duties as the collective-bargaining representative of our distribution employees.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer Kama Cox full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without

prejudice to her seniority or any other rights or privileges previously enjoyed

(b) Make Kama Cox whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, computed on a quarterly basis, less any net interim earnings, as prescribed in **F. W. Woolworth Co., 90 NLRB 289 (1950)**, plus interest as computed in **New Horizons for the Retarded, 283 NLRB 1173 (1987)**.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Kama Cox, and within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order. **Bryant & Stratton Business Institute, 327 NLRB No. 174 (March 31, 1999)**

(e) On request, bargain with the Union as the exclusive collective- bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All distribution employees employed by the Employer at its Eugene, Oregon location; excluding office clerical employees, transportation helpers, bundle haulers, professional employees, guards and supervisors as defined in the Act.

(f) Immediately provide the Union with the information it requested in its September 26, 2000, letter.

(g) Within 14 days after service by the Region, post at its facility in Eugene, Oregon, copies of the attached notice marked "Appendix." **[FN8]** Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are

customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 1, 2000. **Excel Container, Inc., 325 NLRB 17 (1997)**.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated: April 5, 2001

Albert A. Metz

Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:
To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT terminate, discipline and/or take any other adverse actions against employees because they engage in activities in support of Teamsters Local Union No. 206, affiliated with the International Brotherhood of Teamsters, AFL-CIO, or any other labor organization, or engage in protected concerted activities.

WE WILL NOT provide increased benefits to employees to encourage them to refrain from supporting and/or assisting the Union.

WE WILL NOT solicit complaints and grievances from our employees and thereby imply that we will provide improved benefits to employees if they refrain from supporting and/or assisting the Union.

WE WILL NOT create the impression of surveillance of our employees' union activities.

WE WILL NOT solicit employees to withdraw their signatures from the Union's petition, and therefore, withdraw their support from Teamsters Local 206 or any other labor organization.

WE WILL NOT refuse to bargain with, or to provide required information to, Teamsters Local 206, the collective bargaining representative of our employees employed in the distribution center.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights

guaranteed them by Section 7 of the Act.

WE WILL offer Kama Cox full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Kama Cox whole, with interest, for any loss of pay and other benefits she suffered as a result of our unlawful termination of her.

WE WILL remove from our files, including the personnel file of Kama Cox, any reference to the unlawful discharge of Kama Cox and notify Cox, in writing, that this has been done and that the termination will not be used against her in any way.

WE WILL, upon request, bargain in good faith at reasonable times and places with Teamsters Local 206, the exclusive collective bargaining representative of our employees in the following unit with respect to pay, wages, hours, and other terms and condition of employment, and, if an agreement is reached, we will embody such understanding in a signed agreement. The appropriate collective bargaining unit is:

All distribution employees employed by the Employer at its Eugene, Oregon location; excluding office clerical employees, transportation helpers, bundle haulers, professional employees, guards and supervisors as defined in the Act.

WE WILL promptly provide information requested by Teamsters Local 206 that is necessary and relevant for the Union to perform its duties as collective bargaining representative of our distribution employees.

The Guard Publishing Company, d/b/a The Register Guard

Employer

Dated: _____ By:

_____

(Representative)

(Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's office, 915 2 supernd Ave, Room 2948, Seattle, WA 98174-1078. Telephone: (206) 220-6284.

FN1. This case was heard at Eugene, Oregon on December 4-6, 2000. All dates herein refer to the year 2000 unless otherwise stated.

FN2. **29 U.S.C. ' 158 (a)(1), (3) and (5)**.

FN3. The Government's brief notes that Anastasia (Annie) Wilcox also signed the petition, but on June 2. The Government states that it, thus, does not rely on her signature as part of its proof of the Union's June 1 majority status.

FN4. The Respondent moved to strike Cox's testimony because in an affidavit she gave the Government there is a reference to attached "letters" she had received from the Respondent. There was a question as to precisely what the attachments were. After consideration of the record and Cox's testimony it is apparent that the discrepancy, if any, is minor. The Respondent was given a full opportunity to examine Cox and to inquire of the Government about the

matter. It remains unclear if there was more than one letter attached to the affidavit or if the reference in the affidavit was an error. Respondent has not shown how it was prejudiced by this confusion and I find the matter is not sufficient grounds to strike Cox's testimony. I, therefore, deny the Respondent's motion to strike her testimony.

FN5. See also **Anchorage Times, 637 F.2d 1359, 1370 (9th Cir. 1981)**.

FN6. The Respondent's brief makes passing mention of employee turnover in the unit as a possible reason for denying a bargaining order remedy. The record evidence of turnover is scant and the Board does not normally accept such an argument. **Garvey Marine, Inc., 328 NLRB No. 147, slip op. at 5**-6 (1999)("The Board traditionally does not consider turnover among bargaining unit employees in determining whether a bargaining order is appropriate, but rather assesses the appropriateness of this remedy based on the situation at the time the unfair labor practices were committed.") Regardless, I find that the record does not support the conclusion that the effects of the Respondent's unlawful conduct are likely to be sufficiently dissipated by turnover to ensure a free and fair future election. Although some employees who were employed at the time of the unlawful conduct may have left the Respondent's employment for reasons related or unrelated to its unfair labor practices, others who remain would recall these events. Moreover, as noted above, the lingering effects of a generous across-the-board wage increase and the unlawful discharge of a leading union advocate are particularly difficult to dispel.

FN7. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

FN8. If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

No. 01-35481

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAYMOND D. WILLMS, Acting Regional Director of the Nineteenth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board,
Plaintiff - Appellee,

v.

GUARD PUBLISHING COMPANY, d/b/a The Register-Guard,
Defendant - Appellant.

March 21, 2002, Filed

ORDER

Before: HUG, T. NELSON, and GOULD, Circuit Judges.

Judges T. Nelson and Gould have to deny the petition for rehearing en banc and Judge Hug recommended denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

(Any footnotes trail the end of each document.)

No. 01-35481

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAYMOND D. WILLIAMS, Action Regional Director of the Nineteenth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board,
Petitioner,

v.

GUARD PUBLISHING COMPANY, d/b/a
The Register- Guard,
Respondent.

Filed August 19, 2001

ORDER

COFFIN, Magistrate Judge:

Presently before the court are respondent's motion (#34) to stay order granting temporary injunction, respondent's motion (#37) to expedite transfer of record, and respondent's motion (#38) to modify temporary injunction.

BACKGROUND

The facts giving rise to this dispute have been set forth in this court's Order (#31) of May 1, 2001, to which the decision of the Administrative Law Judge, Albert Metz, is attached. Based on the administrative record, the briefing of the parties, and arguments presented at oral argument, this court entered an Order (#32) Granting Temporary Injunction

recommended by ALJ Metz.n1 That interim relief included an interim bargaining order. The legal standard applied by this court to determine whether the temporary injunction should issue, that is, "traditional equitable principles," was set forth in the first order (*31) , and reflects the factors elucidated by the Ninth Circuit in Miller v. California Pacific Medical Center, 19 F.3d 449, 459 (9th Cir. 1994); Scott v. Dunn, 241 F.3d 652, 660 (9th Cir. 2001)

In ruling on respondent's application for a stay, the court must consider the following: 1) the applicant's likelihood of success on the merits; 2) irreparable harm to the applicant if the stay is not. granted; 3) whether the grant of a stay would cause irreparable harm to other interested parties; and 4) how the public interest will best be served. Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

These same factors were considered by this court when deciding whether to grant the temporary injunction, and are discussed in detail in the court's previous order (#31). As to the likelihood of success on the merits, respondent's own counsel had to concede, following the ALJ's decision, that at least on the issue of the wage increase as an unfair labor practice, "on a scale at 1 to 10, as far as the Board's concerned, that"s an 8 or 9 in [petitioner's] favor." (#41, transcript of proceedings, page 26). The court must agree with respondent on this point. It is difficult to characterize this as anything other than "probable" success on the merits. Further, there is evidence in the administrative record to suppert the ALJ's other findings of unfair labor practices.

Respondent again spends much time arguing that it did not waive its objections to the authenticity of the petition signatures (exhibits 2 and 3 in the administrative record). On that issue, it attempts to chastise and revile peitioner's counsel for maintaining that respondent did not preserve its objections to the petitions, accusing petitioner's counsel of looking at only one isolated part of the record, and contending that this part is taken out of context in misleading fashion. However, a full review of the transcript of the

administrative hearing reveals that respondent did not object to the petitions. (See, transcript of proceedings, pages 63 and 79). Respondent stated that it had no objection to exhibit 3 "now" (page 79), after it had already stated that it had "no objection" to exhibit 2 (page 63). Respondent's conditional acceptance of exhibit 3 would have required some action prior to the end of the hearing in order to preserve an objection. Respondent did not so act. While respondent may have preserved its argument that some of those who signed petitions may have thought they were only asking for an election rather than asking for representation, this court will not second guess determinations of credibility decided by the ALJ, especially since the language of the petitions was clear and unequivocal.

Respondent again raises new legal arguments that were not presented to the ALJ. At oral argument in this court, respondent raised the issue of use of petition signatures rather than signatures on authorization cards. When the court asked if that argument was made to the ALJ, respondent's counsel stated, "No, sir, I didn't have to at the time..." Now respondent argues that it did not have objective notice of union activity because the petition was not filed with the NLRB, and claims that its subjective notice is irrelevant. This borders on the frivolous. Respondent clearly had actual notice that the union was organizing its employees to obtain representation status. That notice was the catalyst for what the ALJ found to be five discrete acts of unfair labor practices which effectively negated the organizational effort. A successful rush to slam the door on Union representation as it is being opened (i.e., before objective notice in the form of a petition is filed should not and does not bar the court from fashioning equitable relief in the form of an interim bargaining order where a majority of employees in the unit had authorized the union to represent them prior to the unlawful labor practices.

As to irreparable harm to respondent it a stay is not granted, the "cost of time and money involved in bargaining with the Union, which might not ultimately be certified . . [.]

cannot defeat an interim bargaining order." Dunn 241 F.3d at 669. The only objections previously made by respondent could all be characterized as expenditures of time and money. Now respondent has claimed that it will be limited in making unilateral business decisions regarding the bargaining unit, a freedom it has enjoyed for decades. It describes this curtailment of freedom as an "incredibly onerous burden," but gives the court no more than a vague and general complaint to consider. This is not enough upon which to base a finding of irreparable harm.

While respondent is unlikely to suffer any irreparable harm from the bargaining order, the requested stay would result in the very harm to the employees, the Union, and the public interest that the injunction was designed to prevent.n3 There is evidence to support the ALJ'S finding that respondent's actions so undercut and frustrated the employees' organizing efforts that the conditions existing prior to the alleged unfair labor practices cannot be restored. Further delays in implementing a bargaining order would operate only to the detriment of the employees, and also undermine the enforcement of statutory prohibitions against unfair labor practices. The balance of the hardships in this case tips decidedly in favor of petitionor.

CONCLUSION

Respondent's motion (#34) for a stay is hereby denied. Respondent's motion (#37) for expedited transfer of record is denied in light of the Ninth Circuit's scheduling order. Respondent's motion (#38) to modify temporary injunction is granted to the extent that paragraph 2 (h) is modified to require respondent to file the sworn certification referred to in that paragraph within 30 days after receipt of the form which the regional director will provide.

DATED this 12TH day of July, 2001.

Thomas M. Coffin
United States Magistrate Judge

Footnotes

n1 The court's first order (#31) included the legal analysis of petitioner's request for injunctive relief. The Order (#32) Granting Temporary Injunction, submitted by petitioner, set forth the specific terms of the ALJ'S recommendations which were to be implemented by the injunction.

n2 See letter of 5/31/00 from Register-Guard Editor and Publisher Alton Baker III to Register-Guard employee Bradley Barnhart, which states, in pertinent part: "It has been brought to my attention that a few employees have been talking about representation by a union . . . We will oppose, by all lawful means, the organization of our Distribution Center employees by a labor union.

n3 Given that the ALJ found one of the unfair labor practices to be a wage increase, the denial of the interim bargaining order would leave respondent's employees in the unenviable position of having their benefits frozen pending all further proccedings lest the Register-Guard be subject to similar accusations. It would be most peculiar to so punish the employees for the employer's transgressions.

Supreme Court, U.S.
FILED
AUG 28 2002
CLERK

No. 01-1875

In the Supreme Court of the United States

GUARD PUBLISHING COMPANY,
dba THE REGISTER-GUARD, PETITIONER

v.

RAYMOND D. WILLMS, ACTING REGIONAL DIRECTOR,
NINETEENTH REGION OF THE NATIONAL LABOR
RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

ARTHUR F. ROSENFELD
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

JOHN EMAD ARBAB
Assistant General Counsel

ANNE MARIE LOFASO
Attorney
National Labor Relations Board
Washington, D.C. 20570

30 pp

QUESTION PRESENTED

Whether the Acting Regional Director of the National Labor Relations Board was entitled to interim injunctive relief, pursuant to Section 10(j) of the National Labor Relations Act, 29 U.S.C. 160(j), pending the Board's disposition of an administrative complaint against petitioner.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	3
Argument	4
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Asseo v. *Pan American Grain Co.*, 805 F.2d 23 (1st Cir. 1986)	8
Be-Lo Stores v. *NLRB*, 126 F.3d 268 (4th Cir. 1997)	11
Bloedorn v. *Francisco Foods, Inc.*, 276 F.3d 270 (7th Cir. 2001)	12
Boire v. *Pilot Freight Carriers, Inc.*, 515 F.2d 1185 (5th Cir. 1975), cert. denied, 426 U.S. 934 (1976)	8, 13,1 4
Calatrello v. *"Automatic" Sprinkler Corp.*, 55 F.3d 208 (6th Cir. 1995)	14
Charlotte Amphitheater Corp. v. *NLRB*, 82 F.3d 1074 (D.C. Cir. 1996)	11
Cumberland Shoe Corp., 114 N.L.R.B. 1268 (1963), enforced by 351 F.2d 917 (6th Cir. 1965)	10
Douglas Foods Corp. v. *NLRB*, 251 F.3d 1056 (D.C. Cir. 2001)	11
Flamingo Hilton-Laughlin v. *NLRB*, 148 F.3d 1166 (D.C. Cir. 1998)	11
Harpercollins San Francisco v. *NLRB*, 79 F.3d 1324 (2d Cir. 1996)	11
Hirsch v. *Dorsey Trailers, Inc.*, 147 F.3d 243 (3d Cir. 1998)	14
Hoffman v. *Inn Credible Caterers, Ltd.*, 247 F.3d 360 (2d Cir. 2001)	14

Cases—Continued: Page

Impact Indus., Inc. v. *NLRB*, 847 F.2d 379 (7th Cir. 1988) 11
J.L.M., Inc. v. *NLRB*, 31 F.3d 79 (2d Cir. 1994) 11
Kaynard v. *Mego Corp.*, 633 F.2d 1026 (2d Cir. 1980) .. 13-14
Kinney Drugs, Inc. v. *NLRB*, 74 F.3d 1419 (2d Cir. 1996) 12
Kinney v. *Pioneer Press*, 881 F.2d 485 (7th Cir. 1989) 13
Linden Lumber Div. v. *NLRB*, 419 U.S. 301 (1974) 10
Miller v. *California Pac. Med. Ctr.*, 19 F.3d 449 (9th Cir. 1994) 13
Montgomery Ward & Co. v. *NLRB*, 904 F.2d 1156 (7th Cir. 1990) 11
NLRB v. *Electro-Voice, Inc.*, 83 F.3d 1559 (7th Cir. 1996), cert. denied, 519 U.S. 1055 (1997) 8, 13
NLRB v. *Gissel Packing Co.*, 395 U.S. 575 (1969) 2, 9, 10
NLRB v. *Taylor Mach. Prods., Inc.*, 136 F.3d 507 (6th Cir. 1998) 11
P.H. Nursing Home, Inc., 332 N.L.R.B. No. 21 (Sept. 28, 2000) 12
Rivera-Vega v. *Conagra, Inc.*, 70 F.3d 153 (1st Cir. 1995) 7, 14
Scott v. *Stephen Dunn & Assocs.*, 241 F.3d 652 (9th Cir. 2001) 6, 7-8, 10
Seeler v. *Trading Port, Inc.*, 517 F.2d 33 (2d Cir. 1975) 8
Sharp v. *Parents in Community Action, Inc.*, 172 F.3d 1034 (8th Cir. 1999) 14
Silverman v. *Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054 (2d Cir. 1995) 13
Skyline Distribs. v. *NLRB*, 90 F.3d 403 (D.C. Cir. 1996) 12
Somerset Welding & Steel, Inc. v. *NLRB*, 987 F.2d 777 (D.C. Cir. 1993) 11

Statute:

	Page
National Labor Relations Act, 29 U.S.C. 151 *et seq.*	2
§ 8(a)(1), 29 U.S.C. 158(a)(1)	4
§ 8(a)(3), 29 U.S.C. 158(a)(3)	4
§ 10(j), 29 U.S.C. 160(j)	3, 6, 7, 12, 13, 14

In the Supreme Court of the United States

No. 01-1875

GUARD PUBLISHING COMPANY,
dba THE REGISTER-GUARD, PETITIONER

v.

RAYMOND D. WILLMS, ACTING REGIONAL DIRECTOR,
NINETEENTH REGION OF THE NATIONAL LABOR
RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-5a) is not published in the *Federal Reporter*, but it is available at 25 Fed. Appx. 620.[1] The orders of the district court (Pet. App. 6a-9a, 10a-15a, 54a-58a) are unreported. The decision and recommended order of the administrative law judge (Pet. App. 16a-52a) are unreported.

[1] As reflected in the opinions of the courts below, the correct name of respondent here (petitioner below) is Raymond D. Willms, not the name that appears on the petition for certiorari.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 2002. A petition for rehearing was denied on March 21, 2002 (Pet. App. 53a). The petition for a writ of certiorari was filed on Juné 19, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner publishes a newspaper in Eugene, Oregon. Pet. App. 3a. In May 2000, Teamsters, Local Union No. 206 (Union) began an organizing campaign among the workers employed in petitioner's distribution department. *Id.* at 19a-19a. Petitioner, after learning of the organizing campaign, advised the distribution department employees in writing that it was opposed to union organization. *Id.* at 26a. Over the next several months, petitioner's actions in opposition to the organizing campaign were the subject of unfair labor practice charges filed by the Union with the National Labor Relations Board (NLRB).

On November 17, 2000, following an investigation of the Union's charges, the NLRB's General Counsel issued a consolidated amended administrative complaint against petitioner. The complaint alleged that petitioner had responded to the Union's organizing campaign by committing numerous unfair labor practices in violation of the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.* See Pet. App. 31a-40a.

As relief, the General Counsel requested (among other actions) that the NLRB issue petitioner a remedial bargaining order of the type approved in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). Pet. App. 40a-41a. In *Gissel*, this Court held that the NLRB may require an employer to bargain with a union, without

holding an election among employees, both in "exceptional" cases involving "outrageous" and "pervasive" unfair labor practices (referred to as "category I" cases), as well as in "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes" (referred to as "category II" cases). 395 U.S. at 613-614.

On February 16, 2001, while the administrative proceeding was pending before an administrative law judge (ALJ), the NLRB's Acting Regional Director for Region 19 filed a petition in federal district court under Section 10(j) of the NLRA, 29 U.S.C. 160(j). That provision authorizes the NLRB to seek, and district courts to grant, such preliminary and interim injunctive relief as is "just and proper." Pet. App. 10a.[2] The Acting Regional Director sought an order from the district court requiring petitioner (among other things) to bargain with the Union on an interim basis pursuant to *Gissel* pending the NLRB's final disposition of the administrative complaint. *Id.* at 6a-7a, 8a, 10a.

2. On April 5, 2001, after a hearing, the ALJ issued a decision in the administrative proceeding. Pet. App. 16a-52a. The ALJ found that petitioner had committed "serious and pervasive unfair labor practices in its attempt to discourage support for the Union." *Id.* at

---

[2] Section 10(j) provides, in relevant part: "The Board shall have power, upon issuance of a complaint * * * charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred * * *, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court * * * shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper." 29 U.S.C. 160(j).

42a. Those practices included firing employee Kama Cox because of her activities on behalf of the Union, contrary to Section 8(a)(3) of the NLRA, 29 U.S.C. 158(a)(3). Pet. App. 36a-41a.[3] The ALJ also found that petitioner committed numerous violations of Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), including timing a substantial wage increase to "curtail the Union's organizational campaign" (Pet. App. 33a); soliciting employee grievances "to interfere with the employees' union activities" (*id.* at 34a); and creating the impression among employees that petitioner's editor and publisher, Tony Baker, had their union activities under surveillance (*id.* at 35a).[4]

As a remedy, the ALJ recommended (among other things) that the NLRB issue a *Gissel* category II bargaining order. Pet. App. 40a-43a, 45a-46a. In support of such an order, the ALJ found that, as of June 1, 2000, the Union enjoyed the support of a majority of the employees in the distribution department. *Id.* at 25a, 41a. As of that date, the ALJ found, the Union had obtained 41 valid signatures on union authorization petitions from petitioner's 60 distribution center employees. The petitions signed by the majority contained "unambiguous representation language." *Id.* at 25a.[5]

---

[3] Section 8(a)(3) makes it an unfair labor practice for an employer to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. 158(a)(3).

[4] Section 8(a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act, 29 U.S.C. 157, among which is the right "to form, join, or assist labor organizations." 29 U.S.C. 158(a)(1).

[5] The petitions bore the following heading: "The undersigned hereby authorize the International Brotherhood of Teamsters,

The ALJ rejected, on factual grounds, petitioner's contention that the Union had not achieved majority status because some of the employees who signed authorization petitions did so "believing that they were only authorizing a vote on whether to be represented by the [Union] because of the representations made by the persons who solicited their signatures." *Id.* at 19a; see *id.* at 20a-25a.

The ALJ also concluded that petitioner's "unlawful conduct clearly demonstrates that the holding of a fair election in the future would be unlikely and that the employees' wishes are better gauged by the Union's card majority rather than by an election." Pet. App. 43a. In so concluding, the ALJ explained that petitioner had not only fired Cox, a "leading union advocate," but had timed her discharge to occur on the day before a scheduled employee meeting with the Union. *Id.* at 41a. The ALJ further explained that petitioner's unlawful grant of wage increases, which affected every employee in the distribution department, was "a powerful weapon in [petitioner's] antiunion campaign." *Id.* at 42a. The ALJ noted that such wage increases have a particularly long-lasting effect on employees that is difficult to counteract with traditional remedies. *Ibid.* The ALJ further observed that Baker, petitioner's highest ranking official, played "a direct part in some of the unlawful activity." *Id.* at 41a-42a.

Petitioner filed exceptions to the ALJ's decision and recommended order with the NLRB. Those exceptions

---

Local Union No. 206 as their representative to bargain collectively with their employer on their behalf and to negotiate agreements concerning wages, hours, and all other conditions of employment." Pet. App. 20a.

are currently pending before the NLRB. See Pet. 15 n.2.

3. In an order dated May 1, 2001, as amplified by a subsequent order denying petitioner's request for a stay, the district court granted the Acting Regional Director's request for interim relief under Section 10(j), including an interim *Gissel* bargaining order. Pet. App. 6a-15a, 54a-58a. The court explained that it was required to "rely on traditional equitable principles to determine whether interim relief is appropriate" under Section 10(j). *Id.* at 10a (quoting *Scott* v. *Stephen Dunn & Assocs.*, 241 F.3d 652, 660 (9th Cir. 2001)); see *id.* at 54a-55a. Applying those principles, the court found a "probability [of] the Regional Director's success on the merits" before the NLRB in the administrative proceeding against petitioner. *Id.* at 12a; see *id.* at 4a.

With respect to the interim *Gissel* bargaining order, the district court found that the record evidence supported the ALJ's finding that the Union had achieved majority status among the employees on the basis of signed authorization petitions. Pet. App. 12a-13a; see *id.* at 55a. The court further found that the record evidence supported the ALJ's finding that "[petitioner's] actions so undercut and frustrated the employees' organizing efforts that the conditions existing prior to the alleged unfair labor practices cannot be restored." *Id.* at 57a. The court found "no credible argument that an interim bargaining order would cause [petitioner] any hardship." *Id.* at 13a. To the contrary, the court concluded that "[f]urther delays in implementing a bargaining order would operate only to the detriment of the employees, and also undermine the enforcement of statutory prohibitions against unfair labor practices." *Id.* at 57a.

4. The court of appeals affirmed the issuance of the Section 10(j) injunction in an unpublished memorandum decision. Pet. App. 2a-5a. The court of appeals concluded that the district court acted within its discretion in granting the injunction, and that the district court had "identified the correct legal standards, and applied them in a reasonable manner." *Id.* at 4a.

ARGUMENT

Petitioner contends that the court of appeals erred in affirming the district court's grant of an interim bargaining order under Section 10(j) of the NLRA, 29 U.S.C. 160(j), pending the NLRB's disposition of the administrative complaint against petitioner. The court of appeals and the district court correctly applied settled law to the particular facts of this case. Although, as petitioner notes (Pet. 17), the circuits have adopted different verbal formulations of the standard for granting Section 10(j) relief, those formulations are unlikely to produce different results. And, in any event, the Ninth Circuit, in which this case originated, has adopted petitioner's preferred formulation. This Court's review is, therefore, not warranted.

1. Section 10(j) "authorizes the NLRB to seek, and the United States district courts to grant, interim relief pending the NLRB's resolution of unfair labor practices." *Rivera-Vega* v. *Conagra, Inc.*, 70 F.3d 153, 158 (1st Cir. 1995). Numerous courts of appeals agree that Section 10(j) relief, including an interim *Gissel* bargaining order, is appropriate where, as here, an employer has attempted to defeat a union organizing campaign that has garnered the support of a majority of the employees by committing unfair labor practices that are serious and pervasive enough to render a fair election unlikely. See, *e.g.*, *Scott* v. *Stephen Dunn &*

Assocs., 241 F.3d 652 (9th Cir. 2001); *NLRB* v. *Electro-Voice, Inc.*, 83 F.3d 1559 (7th Cir. 1996), cert. denied, 519 U.S. 1055 (1997); *Asseo* v. *Pan American Grain Co.*, 805 F.2d 23 (1st Cir. 1986); *Seeler* v. *Trading Port, Inc.*, 517 F.2d 33 (2d Cir. 1975); cf. *Boire* v. *Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1194 (5th Cir. 1975) (upholding refusal to issue interim bargaining order where court of appeals was "not convinced that a continuation of the non-bargaining status will so deleteriously affect the union that it cannot recover"), cert. denied, 426 U.S. 934 (1976). In such cases, "the election process has been rendered so meaningless by the employer, that the authorization cards are a clearly superior gauge of employee sentiment." *Trading Port*, 517 F.2d at 40. An interim Section 10(j) bargaining order "then becomes a just and proper means of restoring the pre-unfair labor practice status quo and preventing further frustration of the purposes of the Act." *Ibid.*

2. Petitioner contends (Pet. 7-15) that a district court lacks authority to issue an interim bargaining order in a *Gissel* category II case if the union has not tested its representational claims in an election conducted by the NLRB. There is no merit to that contention. By committing unfair labor practices that are serious and pervasive (even if not "outrageous" under *Gissel* category I), an employer may render the NLRB's election process "meaningless." *Trading Port*, 517 F.2d at 40. In that situation, a union may rationally conclude that there is no practical reason to petition the NLRB to conduct an election. Unions are not required to seek elections, nor is the NLRB required to hold them, in an atmosphere of unremedied unfair labor practices that are likely to skew the outcome. As this Court explained in *Gissel*, the propriety of a bargaining order in a category II case turns solely on whether "the

possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and * * * employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." 395 U.S. at 614-615. The district court determined that other interim remedies would not suffice to ensure a fair election in this case (see Pet. App. 13a, 57a), and the court of appeals affirmed. There is no reason for this Court to review that fact-specific determination.[6]

Petitioner asserts (Pet. 10) that the district court should not have issued an interim bargaining order here because "[a]n employer may lawfully refuse to bargain even when a union makes a demand to bargain based on majority support," and petitioner doubted whether the Union enjoyed majority support absent an NLRB election. The principle upon which petitioner relies is inapposite here. An employer who is faced with a union's demand for recognition based on a purported card majority may, generally speaking, refuse that demand and require the union to invoke the NLRB's election processes. An employer may *not* do so, however, when it "has engaged in an unfair labor

---

[6] Petitioner suggests (Pet. 8, 10-11) that the Union's failure to file a representation petition deprived petitioner of "objective notice" that the Union was seeking to represent its employees. As the district court observed, that contention "borders on the frivolous." Pet. App. 56a. The district court found that petitioner "clearly had actual notice that the union was organizing its employees to obtain representation status," which notice was the "catalyst" for subsequent unfair labor practices that "effectively negated the organizational effort." *Ibid.* In any event, even if petitioner could assert a colorable claim of lack of notice, that claim would be of no significance beyond this case.

practice that impairs the electoral process." *Linden Lumber Div.* v. *NLRB*, 419 U.S. 301, 310 (1974); accord *Gissel*, 395 U.S. at 594, 600. The district court found that the Acting Regional Director would probably succeed in establishing that petitioner had engaged in such practices. See Pet. App. 12a, 55a.

Petitioner contends (Pet. 8-9, 15, 17) that the district court should not have issued an interim bargaining order because the Acting Regional Director relied on signed authorization petitions, rather than authorization cards, to demonstrate the Union's majority status. As the district court noted (see Pet. App. 12a, 15a n.5), there is no legal authority for the distinction that petitioner would draw between authorization cards and authorization petitions. The Acting Regional Director, moreover, carried his burden of demonstrating that the employee petitions were "arguably valid to establish a majority." *Stephen Dunn & Assocs.*, 241 F.3d at 659. Under settled law, a signed card stating that the employee authorizes the union to represent him for purposes of collective bargaining is valid unless the individual soliciting the card told the employee that the card would be used only to obtain an election. See *Cumberland Shoe Corp.*, 144 N.L.R.B. 1268, 1269 (1963), enforced by 351 F.2d 917 (6th Cir. 1965); see also *Gissel*, 395 U.S. at 584, 606 (discussing *Cumberland Shoe* test). Based on its review of the record, the district court concluded that there was no reason to "second guess" the ALJ's finding (which was based in part on credibility determinations) that, under the *Cumberland Shoe* test, the 41 signatures appearing on the Union's authorization petitions were valid. See Pet. App. 12a-13a, 15a n.5, 56a; see also *id.* at 18a-25a.

Petitioner suggests (Pet. 12-14) that the district court should not have issued an interim bargaining

order because the ALJ's recommended final bargaining order, if adopted by the NLRB, is unlikely to be enforced by the reviewing court. The decisions on which petitioner relies declined to enforce bargaining orders in circumstances that are not present here. For example, petitioner cites a number of cases that address whether changed circumstances occurring after the employer's commission of unfair labor practices (such as significant employee turnover) undermined the NLRB's conclusions about the possibility of the holding of a fair election.[7] Here, however, in recommending a bargaining order, the ALJ explained that petitioner had made only "passing mention" of employee turnover in the distribution department and introduced "scant" evidence into the record on that subject. Pet. App. 51a n.6. Other cases cited by petitioner involve unfair labor

---

[7] See, *e.g.*, *Douglas Foods Corp.* v. *NLRB*, 251 F.3d 1056, 1066 (D.C. Cir. 2001) (noting that the employer "no longer maintained 'retail' operations" some five years after the unfair labor practices and that "fewer than five of the employees" from that period "were still in [its] employ"); *Flamingo Hilton-Laughlin* v. *NLRB*, 148 F.3d 1166, 1171 (D.C. Cir. 1998) (noting "changes in the [employer's] operation and personnel in the years since the election"); *NLRB* v. *Taylor Mach. Prods., Inc.*, 136 F.3d 507, 520 (6th Cir. 1998); *Be-Lo Stores* v. *NLRB*, 126 F.3d 268, 282-283 (4th Cir. 1997); *Charlotte Amphitheater Corp.* v. *NLRB*, 82 F.3d 1074, 1078-1080 (D.C. Cir. 1996); *Harpercollins San Francisco* v. *NLRB*, 79 F.3d 1324, 1332-1333 (2d Cir. 1996); *J.L.M., Inc.* v. *NLRB*, 31 F.3d 79, 84 (2d Cir. 1994)); *Impact Indus., Inc.* v. *NLRB*, 847 F.2d 379, 383 (7th Cir. 1988); see also *Somerset Welding & Steel, Inc.* v. *NLRB*, 987 F.2d 777, 782 (D.C. Cir. 1993) (remanding for NLRB to consider, *inter alia*, whether "changes in management and employee turnover have made a bargaining order unnecessary"); *Montgomery Ward & Co.* v. *NLRB*, 904 F.2d 1156, 1160 (7th Cir. 1990).

practices that were less severe and pervasive than those at issue here.[8]

Petitioner contends (Pet. 16) that the district court "gave entirely too much deference to the recommendation of the ALJ." The district court, however, issued the interim bargaining order based on its "own review" of the record, as well as on the ALJ's findings and conclusions. Pet. App. 4a. As the Seventh Circuit has explained, moreover, an ALJ's decision is "relevant to the propriety of [S]ection 10(j) relief." *Bloedorn* v. *Francisco Foods, Inc.*, 276 F.3d 270, 288 (7th Cir. 2001). Because the ALJ has "presided over the merits hearing" as the NLRB's "first-level decisionmaker," "the ALJ's factual and legal determinations supply a useful benchmark against which the [Regional] Director's prospects of success may be weighed." *Ibid.*

3. Petitioner contends (Pet. 19-23) that this Court should grant review to resolve an asserted "conflict" among the circuits with respect to the standard for granting interim injunctive relief under Section 10(j). There is no square conflict on that question that

---

[8] See, *e.g.*, *Skyline Distribs.* v. *NLRB*, 99 F.3d 403, 410 (D.C. Cir. 1996) (noting that unfair labor practices consisted "solely" of "the grant of economic inducements"); *Kinney Drugs, Inc.* v. *NLRB*, 74 F.3d 1419, 1432 (2d Cir. 1996) (concluding that all but one of the unfair labor practices were "trivial" and that the other was not "egregious"). Petitioner contends (Pet. 15), citing *P.H. Nursing Home, Inc.*, 332 N.L.R.B. No. 21 (Sept. 28, 2000), that the NLRB itself may reject the ALJ's recommended *Gissel* order. *P.H. Nursing Home* is unlike this case. There, the employer did not time a wage increase to discourage employee support for the union, and none of the employer's misconduct "emanated from upper level management." 332 N.L.R.B. No. 21, slip op. 12-13. *P.H. Nursing Home* thus did not involve the employer conduct that the ALJ and the district court found was particularly likely to affect adversely the results of any election here.

warrants the Court's review. The courts of appeals, while adopting different verbal formulations of the standard, require district courts to consider similar criteria. It is thus unlikely that those formulations would produce differences in outcome. In any event, since the Ninth Circuit already applies petitioner's preferred formulation, this Court's adoption of that formulation would be of no benefit to petitioner.

a. Some courts of appeals, including the Ninth Circuit, assess whether Section 10(j) relief is "just and proper," 29 U.S.C. 160(j), by "evaluat[ing] the propriety of the [Regional] Director's request with an eye toward the traditional equitable principles that normally guide such an inquiry." *Kinney* v. *Pioneer Press*, 881 F.2d 485, 490 (7th Cir. 1989). Accordingly, those courts consider, as part of the "just and proper" inquiry, whether the Regional Director has demonstrated that "she has some likelihood of succeeding on the merits," that "the labor effort would be irreparably harmed absent the injunction," and that "the irreparable harm outweighs any irreparable harm to the employer." *Electro-Voice*, 83 F.3d at 1567-1568; accord, *e.g.*, *Miller* v. *California Pac. Med. Ctr.*, 19 F.3d 449, 456-461 (9th Cir. 1994) (en banc).

Other courts of appeals apply a two-part analysis of the propriety of Section 10(j) relief, which considers whether the Regional Director has demonstrated "reasonable cause" to believe that the NLRA was violated and has demonstrated that interim relief would be "just and proper" under the circumstances. See, *e.g.*, *Silverman* v. *Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054, 1059 (2d Cir. 1995); *Pilot Freight*, 515 F.2d at 1188-1189. That analysis may also involve the consideration of "general equitable criteria." *Kaynard* v. *Mego Corp.*, 633 F.2d 1026, 1033 (2d

Cir. 1980). The "reasonable cause" inquiry, like an inquiry into the "likelihood of success on the merits," considers the strength of the Regional Director's position. See, *e.g.*, *Pilot Freight*, 515 F.2d at 1189. The "just and proper" inquiry may consider whether interim relief is necessary "to prevent irreparable harm or to preserve the status quo," *Hoffman* v. *Inn Credible Caterers, Ltd.*, 247 F.3d 360, 368 (2d Cir. 2001); whether interim relief would impose an unwarranted burden on the employer, see *Calatrello* v. *"Automatic" Sprinkler Corp.*, 55 F.3d 208, 215 (6th Cir. 1995); and "the public interest," *Hirsch* v. *Dorsey Trailers, Inc.*, 147 F.3d 243, 247 (3d Cir. 1998); accord, *e.g.*, *Conagra*, 70 F.3d at 164.

The courts of appeals thus appear to be in substantial agreement with respect to the criteria under which district courts are to evaluate a Regional Director's request for interim injunctive relief under Section 10(j). See *Sharp* v. *Parents in Community Action, Inc.*, 172 F.3d 1034, 1038 (8th Cir. 1999) (noting that "the significance of this theoretical debate [about the test for Section 10(j) relief] diminishes when one recalls the flexibility inherent in traditional equitable principles"). Any differences in approach among the circuits seem unlikely to produce differences in outcome.

b. Finally, even if any variation among the circuits with respect to the standard for Section 10(j) relief warranted the Court's resolution in an appropriate case, this is not such a case. Here, the district court, affirmed by the court of appeals, applied the "traditional equitable principles" test advocated by petitioner in determining that the Acting Regional Director was entitled to Section 10(j) relief. See Pet. App. 3a-5a, 10a-11a, 54a-55a. Although petitioner suggests (Pet. 21-22) that the district court actually applied a "reason-

able cause" test, that suggestion is incorrect. As the court of appeals explained, although the district court used the term "reasonable cause" in the text of its injunction decree (see Pet. App. 6a), the order accompanying the decree made "clear" that "the district court identified and applied the correct legal standard in reaching its decision, regardless of the 'reasonable cause' language." *Id.* at 5a n.1.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ARTHUR F. ROSENFELD
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

JOHN EMAD ARBAB
Assistant General Counsel

ANNE MARIE LOFASO
Attorney
National Labor Relations Board

AUGUST 2002

Supreme Court, U.S.
FILED
SEP 10 2002

(3)

No. 01-1875

In the

Supreme Court of the United States

GUARD PUBLISHING COMPANY, d/b/a
The Register- Guard,

Petitioners,

v.

RAYMOND D. WILLMS, Acting Regional Director of the Nineteenth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF

L. Michael Zinser
Counsel of Record
Glenn E. Plosa
THE ZINSER LAW FIRM, P.C.
150 Second Avenue North
Suite 410
Nashville, Tennessee 37201
Telephone: 615.244.9700
Facsimile: 615.244.9734
Attorneys for Petitioners

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCINFO.COM

17 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 10

APPENDIX

MEMORANDUM GC 02-07 (8/9/02) 1a

TABLE OF AUTHORITIES

CASES

ASSEO V. PAN AM. GRAIN CO., 805 F.2D 23 (1ST CIR. 1986) 4, 5

BOIRE V. PILOT FREIGHT CARRIERS, INC., 515 F.2D 1185 (5TH CIR. 1975) 7

FUCHS V. STEEL-FAB, INC., 356 F.SUPP. 385 (D.MASS. 1973) 7

HIRSCH V. PICK MT. LAUREL CORP., 436 F.SUPP. 1342 (D.N.J. 1977) 7

LINDEN LUMBER DIVISION, SUMMER & CO. V. NLRB, 419 U.S. 301, 95 S. CT. 429, 42 L. ED. 2D 465 (1974) 8

NLRB V. ELECTRO-VOICE, INC., 83 F.3D 1559 (7TH CIR. 1996), CERT. DENIED, 519 U.S. 1055, 117 S. CT. 683, 136 L. ED. 2D 608 (1997) 3, 4

NLRB V. GISSEL PACKING CO., INC., 395 U.S. 575, 89 S. CT. 1918, 23 L. ED. 2D 547 (1969) 2

NLRB V. SAVAIR MFG. CO., 414 U.S. 270, 94 S. CT. 495, 38 L. ED. 2D 495 (1973) 3

P.H. NURSING HOME, INC., 332 NLRB NO. 27 (SEPTEMBER 28, 2000) 3

PHILANZ OLDSMOBILE, INC., 137 NLRB 867, 881 (1962) 8

SCOTT V. STEPHEN DUNN & ASSOCS., 241 F.3D 652 (9TH CIR. 2001) 2

SEELER V. TRADING PORT, INC., 517 F.2D 33 (2ND CIR. 1975) 1, 5, 6

SNOW V. NLRB, 308 F.2D 687 (9TH CIR. 1962) 9

TRADING PORT, INC., 219 NLRB 298, 298 (1975) 5, 6

WELLS V. BROWN & ROOT, INC., 65 F.SUPP. 2D 1264 (S.D.ALA. 1999) 7

WILSON V. HART SKI MFG. CO., 472 F.SUPP. 484 (D.MINN. 1979) 7

STATUTES

29 U.S.C. § 151 ..... 1, 2

ARGUMENT

A. INJUNCTIVE RELIEF PURSUANT TO SECTION 10(J) OF THE NATIONAL LABOR RELATIONS ACT ON A *GISSEL* CATEGORY II BARGAINING ORDER THEORY IS INAPPROPRIATE WHERE THE MECHANISM FOR A FREE AND FAIR ELECTION HAS NOT BEEN CREATED.

It is axiomatic that the "election process" the National Labor Relations Board ("the NLRB") claims was "impeded" by *The Register-Guard* must precede an election. Opp`n. Br. 3, 8 (citing *Seeler v. Trading Port, Inc.*, 517 F.2d 33, 40 (2nd Cir. 1975)). In the instant case, there was no election. The union never even filed a Representation Certification petition ("RC petition"). There was no "election process" because the union failed to avail itself of the National Labor Relations Act ("the NLRA"), 29 U.S.C. § 151 et. seq., and petition the Region for an election pursuant to Section 9(c) of the NLRA. *The Register-Guard* did nothing to prevent the union from petitioning the Region for an election. A free and fair election pursuant to the NLRA simply cannot occur without even attempting to create the mechanism for an election. The union failed to avail itself of the NLRA; it should thus be precluded from its remedial provisions.

B. THE NLRB FAILED TO CONSIDER EMPLOYEES' RIGHTS; THE PUBLIC INTEREST HAS BEEN IGNORED.

Perhaps the most disturbing aspect of the instant case is the NLRB's complete disregard for the employees' ability to exercise their Section 7 rights under the NLRA and have an election. Ironically, new NLRB General Counsel Arthur Rosenfeld recently announced to the public that 10(j) injunctions "should be used to protect the right of employees to freely choose whether or not they want union representation." G.C. Memorandum 02-07 (August 9, 2002); Supplemental Ap. 2a. General Counsel Rosenfeld specifically stated "in the union organizing context, Section 10(j) relief appropriately fosters employee free choice where the processing of a representation petition is blocked by serious

unfair labor practices but the petitioner would be willing to proceed to an election under the protection of a court-ordered injunction." *Id.* The General Counsel explained that "in the union organizing context" a 10(j) injunction should be used to create a fair secret ballot election, ***not*** a bargaining relationship by judicial fiat. A forced bargaining relationship would trample employees' Section 7 rights to refrain from organizing a union.

In the instant case, the employees were never presented any chance to vote.

C. THE NLRB CITED NO AUTHORITY TO SUPPORT A 10(J) INJUNCTION BASED ON A *GISSEL* CATEGORY II BARGAINING ORDER THEORY WHERE NO RC PETITION WAS FILED, NO ELECTION WAS HELD, NO DEMAND FOR RECOGNITION BASED ON A PURPORTED UNION AUTHORIZATION CARD MAJORITY WAS MADE, AND THERE ARE NO UNION AUTHORIZATION CARDS.

The NLRB cited only one case to support 10(j) relief, on a *Gissel* category II theory, *see NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969), *Scott v. Stephen Dunn & Assocs.*, 241 F.3d 652 (9th Cir. 2001). Opp'n. Br. 7-8. In *Stephen Dunn & Assocs.*, the union initially demanded recognition pursuant to a purported union authorization card majority, the employer refused to recognize the union, the union filed an RC petition, the union lost the election, the union filed unfair labor practice charges, the company committed "serious but less pervasive" unfair labor practices, the union demonstrated majority support through a disputed union authorization card majority, and bargaining was ordered on a *Gissel* category II theory. *Stephen Dunn & Assocs.*, 241 F.3d at 658-60, 666.

Here, the union never demanded bargaining pursuant to a purported union authorization card majority, the union never filed an RC petition, there was no election, the union never obtained majority support through union authorization

cards,[1] there were no union authorization cards, and employee testimony invalidated the petitions to demonstrate majority support. Furthermore, assuming, *arguendo*, that the allegations levied against *The Register-Guard* are upheld by the NLRB, the allegations do not warrant a bargaining order. *See P.H. Nursing Home, Inc.*, 332 NLRB No. 27 (September 28, 2000).

The NLRB cited three *Gissel* category I cases to support its position; however, each case has serious legal and factual flaws when applied to the instant dispute.

In *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559 (7th Cir. 1996), cert. denied, 519 U.S. 1055, 117 S. Ct. 683, 136 L. Ed. 2d 608 (1997), the union obtained uncontested union authorization cards, demanded recognition of the employer,

---

[1] The NLRB implied, without authority, that there is no legal difference between a union authorization card and the petitions signed in the instant case. Opp'n. Br. 10. The NLRB relied exclusively upon case law regarding union authorization cards to make its argument. With all due respect, this is a novel issue of law that should be first addressed by the NLRB, not this Honorable Court. This argument is not currently before this Honorable Court, but, to the extent that it is persuasive authority on the issue, *The Register-Guard* respectfully directs this Honorable Court to its decision in *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 277-78, 94 S. Ct. 495, 499, 38 L. Ed. 2d 495 (1973), where, in the context of recognition slips that were signed by employees prior to an election to waive an initiation fee if the union won an election, and were actually shown to coworkers, by a union, to demonstrate purported majority support before an election, this Honorable Court explained:

> Whatever his true intentions, an employee who signs a recognition slip prior to an election is indicating to other workers that he supports the union. His outward manifestation of support must often serve as a useful campaign tool in the union's hands to convince other employees to vote for the union, ***if only because many employees respect their coworkers' views on the unionization issue.***

Savair Mfg. Co., 414 U.S. at 277, 94 S. Ct. at 499, 38 L. Ed. 2d 495. (emphasis added). Regardless, a petition has ***never*** supported a 10(j) injunction based on a *Gissel* Category II bargaining order theory.

and filed an RC petition for an election. *Electro-Voice, Inc.*, 83 F.3d at 1563-65; *see also*, *Electro-Voice, Inc.*, 320 NLRB 1094, 1096 (1996). In response to the demand for recognition, the employer committed serious and pervasive unfair labor practices, i.e., *Gissel* category I violations, including terminating one-third of its workforce, threatening to close the plant, threatening employees for supporting the union, conditioning grievance remedies on withdrawing support for the union, and engaging in surveillance. *See Electro-Voice, Inc.*, 83 F.3d at 1566; *see also*, *Electro-Voice, Inc.*, 320 NLRB at 1112. Nothing so draconian occurred with *The Register-Guard*. However, even in *Electro-Voice, Inc.*, a *Gissel* category I case, the union obtained a union authorization card majority and filed an RC petition for an election.

The Seventh Circuit, in *Electro-Voice, Inc.*, ruled that a union has an obligation to put an employer on notice that there exists a true question of representation ***before*** a bargaining order can issue. The court explained that "when a union requests recognition and bargaining from an employer which was presented with cards showing a majority support for the union and the employer subsequently engages in unfair labor practices which destroy the 'laboratory conditions' needed for a fair election, the employer forfeits any right to an election and must bargain with the union or violate section 8(a)(5) of the [NLRA]." *Id.* at 1572.

In the instant case, *The Register-Guard* was never presented with, or even offered, union authorization cards, nor did the union ever claim to possess union authorization cards. The record evidence demonstrates there were no union authorization cards, nor a RC petition for an election. The union wrote a letter on September 26, 2000, demanding bargaining ***retroactive*** to June 1, 2000. In response to the letter, *The Register-Guard* refused to recognize the union and explained that it would only recognize the union after it was certified by an NLRB-conducted secret-ballot election. *The Register-Guard* simply demanded the union to avail itself of the NLRA.

Asseo v. Pan Am. Grain Co., 805 F.2d 23 (1st Cir. 1986), was a *Gissel* category I case due to the "overt violations of the Act" and "flagrant misconduct" of the employer, including: terminating four of twenty-two employees who were "prominent" union supporters, "offering money for a vote against the Union, threats to discharge employees who supported the Union, and threats to close the plant should the Union prevail." *Pan Am. Grain Co.*, 805 F.2d at 27-28. Furthermore, the employer "instigated a petition disavowing interest in the Union ... that employees signed out of fear of reprisals." Even so, the union, in *Pan Am. Grain Co.*, availed itself of the NLRA by filing an RC petition, and, after losing an election, demonstrated majority support through uncontested union authorization cards. *Id.* at 25, 28-29.

Pan Am. Grain Co., simply does not apply to the instant case. The NLRB has pursued a *Gissel* category II theory against *The Register-Guard*. *Pan Am. Grain Co.*, was a *Gissel* category I case. Furthermore, the facts in *Pan Am. Grain Co.*, support *The Register-Guard's* arguments because the union filed an RC petition, there was an election, and the union demonstrated majority status through valid union authorization cards.

The NLRB also cited *Seeler v. Trading Port, Inc.*, 517 F.2d 33 (2nd Cir. 1975), to support a 10(j) injunction against *The Register-Guard*. In *Trading Port, Inc.*, the employees initially engaged in a recognition strike, then filed an RC petition. During the election campaign, the employer committed unfair labor practices, including: threats of job loss if the union won the election, promises conditioned on abandoning support for the union, threatening to close its business, coercively interrogating employees about how they would vote, and discriminating against union supporters in its rehiring process after the strike, but before the election. The union lost the election and the NLRB sought bargaining pursuant to *Gissel* based on valid union authorization cards the employees had signed prior to the election. *See Trading Port Inc.*, 517 F.2d at 35-36; *see also Trading Port, Inc.*, 219

NLRB 298, 298 (1975). In *Trading Port, Inc.*, the Second Circuit reversed and remanded the District Court's denial of a 10(j) injunction for a finding of whether the alleged unfair labor practices "were in fact so serious as to warrant the issuance of an interim bargaining order." 517 F.2d at 40. The NLRB later ordered bargaining pursuant to *Gissel* because, due to "the nature and pervasiveness of the [employer]'s unfair labor practices ... a fair election (is) impossible and [ ] a bargaining order is warranted to best protect the employees' rights." *Trading Port, Inc.*, 219 NLRB at 300.

Of particular import to the instant case was the Second Circuit's narrow finding that:

> ... the issuance of a bargaining order by a district court ***after a union has lost an election*** is, undoubtedly, a serious measure which should not be undertaken whenever a claim of unfair labor practices is made. ***We hold only that when the Regional Director makes a showing, based on authorization cards***, that the union at one point had a clear majority and that the employer ***then*** engaged in such egregious and coercive unfair labor practices as to make a fair election virtually impossible, the district court should issue a bargaining order under § 10(j). In such a case the election process has been rendered so meaningless by the employer, that the ***authorization cards*** are a clearly superior gauge of employee sentiment.

Trading Port, Inc., 517 F.2d at 40 (emphasis added). In the instant case, there is no authority to support the conclusions drawn by the courts below. A 10(j) injunction compelling *The Register-Guard* to bargain prior to an NLRB determination on the underlying issues is simply not warranted.

D. A BARGAINING RELATIONSHIP SHOULD NOT BE CREATED BY "JUDICIAL FIAT."

The NLRB cited *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1194 (5th Cir. 1975) as a different but sufficiently analogous authority to support its argument. Opp'n. Br. 8. The NLRB has misstated the proposition for which *Pilot Freight Carriers, Inc.* stands. In *Pilot Freight Carriers, Inc.*, the union demanded bargaining based on a union authorization card majority and the employer "repeatedly refused" to bargain. *See Pilot Freight Carriers, Inc.*, 515 F.2d at 1190. In *Pilot Freight Carriers, Inc.*, the employer and union agreed to a "'final and binding card check' to 'resolve the representational issues'." 221 NLRB 1026, 1028 (1975). The Fifth Circuit was loathe to compel bargaining because "[h]ere the signing of union authorization cards precipitated the entire controversy; hence the status quo ante was that period prior to any union activity when the drivers and dockworkers were unrepresented. An interim bargaining order would materially alter that status, creating by judicial fiat a relationship that has never existed." *Pilot Freight Carriers, Inc.*, 515 F.2d at 1194 (citing *Fuchs v. Steel-Fab, Inc.*, 356 F.Supp. 385 (D.Mass. 1973); accord *Wells v. Brown & Root, Inc.*, 65 F.Supp. 2d 1264, 1276 (S.D.Ala. 1999). *See also, Wilson v. Hart Ski Mfg. Co.*, 472 F.Supp. 484, 486 (D.Minn. 1979) (10(j) injunction denied where unfair labor practice charges and petition for injunction were contemporaneously filed because a bargaining order through an injunction would "go far beyond maintaining the status quo."); *Hirsch v. Pick Mt. Laurel Corp.*, 436 F.Supp. 1342, 1359 (D.N.J. 1977) (10(j) injunction denied because "a mandatory bargaining order would recognize a union which has not shown that it ever received the support of an uncoerced majority of workers."). In the instant case, a bargaining relationship has been created by judicial fiat. The injunction has destroyed the status quo.

E. AN ELECTION IS THE PREFERRED METHOD OF SELECTING A COLLECTIVE BARGAINING REPRESENTATIVE.

The Register-Guard continues to have a good faith doubt about whether a union represents its Distribution Department employees. There was never an RC petition filed, there was no election, and there were no union authorization cards.

The NLRB has already held:

> Section 9(c) of the [NLRA] provides orderly and peaceable procedures for the determination of all questions concerning the representation of employees under the [NLRA] ... it is clear that, once a petition has been filed under Section 9(c), the Board has the power and the obligation not only to decide the question of representation in accordance with the statutory provisions and the congressional objectives prompting their enactment, but also to regulate the use of the processes in accordance with these provisions and objectives, and protect them against abuse.

Philanz Oldsmobile, Inc., 137 NLRB 867, 881 (1962). The NLRB appears to be abusing its own processes in the instant case by circumventing Section 9(c) of the NLRA, and seeking to compel bargaining absent filing an RC petition.

This Honorable Court, in *Linden Lumber Division, Summer & Co. v. NLRB*, 419 U.S. 301, 310, 95 S. Ct. 429, 434, 42 L. Ed. 2d 465 (1974), (emphasis added), summarized its ruling by explaining "unless an employer has engaged in an unfair labor practice that impairs the electoral process, a union with authorization cards purporting to represent a majority of the employees, which is refused recognition, ***has the burden of taking the next step in invoking the***

Board's election procedure." Here, the alleged unfair labor practices occurred contemporaneous with or subsequent to June 1, 2000. None of the alleged violations "impaired the electoral process." The union was obligated to "take the next step in invoking the Board's election procedure." The union never availed itself of the NLRA.

In *Snow v. NLRB*, 308 F.2d 687, 691 (9th Cir. 1962), an appeal from the NLRB that enforced a *Gissel* bargaining order, the Ninth Circuit explained:

> ... if [an employer] in good faith doubted that the union represented a majority of their employees on (the date recognition was claimed), they were warranted in refusing to recognize the union until the claim was established by a Board election, even though the union in fact had majority status at that time."

The Register-Guard absolutely doubted the union's dubious claim of majority status made on September 26, 2000, ***retroactive*** to June 1, 2000.

The statutory framework of Section 9(c) of the NLRA is designed to promote a democratic election and compel a union to assert that there is an objective question of representation. Elections protect employees' rights. Unions must risk the ballot box. In the instant case, the union has never availed itself of the NLRA and asserted that there was an objective question of representation to compel an election. It is just rank speculation to predict how the union would have fared if it had risked the ballot box. In essence, the union has won the lottery without ever purchasing a ticket.

CONCLUSION

Wherefore, Petitioner, *The Register-Guard*, respectfully requests that this Honorable Court grant its Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

L. Michael Zinser
Counsel of Record
Glenn E. Plosa
THE ZINSER LAW FIRM, P.C.
150 Second Avenue North
Suite 410
Nashville, Tennessee 37201
Telephone: 615.244.9700
Facsimile: 615.244.9734

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 02-07 August 9, 2002

TO: All Regional Directors, Officers-in-Charge and Resident Officers

FROM: Arthur F. Rosenfeld, General Counsel

SUBJECT: Utilization of Section 10(j) Proceedings

During the time that I have been General Counsel, it has become clear to me that the Section 10(j) program is, and must continue to be, an important tool in administering the Act. In certain cases, temporary injunctive relief under Section 10(j) of the National Labor Relations Act is a necessary and effective way to protect employees' Section 7 rights and the Board's remedial processes. To that end, the regional offices should consider the propriety of interim injunctive relief in every case. At the Field Managers' conference in June 2002, a recent decline in the number of cases identified for Section 10(j) relief by regional offices was noted. To assure that all cases warranting interim relief receive full consideration in the regional offices, the Division of Operations Management, at my request, has begun to discuss with you whether any cases under investigation may be appropriate 10(j) vehicles. In addition, as a method of providing guidance on the types of cases I believe warrant Section 10(j) relief, the Injunction Litigation Branch has begun to post on its Outlook bulletin board descriptions of all Section 10(j) cases for which I have sought Board authorization.

Certainly not every complaint warrants Section 10(j) relief. In reviewing cases, the regions should continue to evaluate two factors. Most important is the potential threat that the Board's ultimate order will be ineffective to remedy the unfair labor practices and to protect statutory rights. The other factor is the strength of the alleged violations.

As to the first element of Section 10(j) analysis–the threat of remedial failure–I am particularly interested in the utilization of Section 10(j) to protect the right of employees to freely choose whether or not they want union representation. For example, in the union organizing context, Section 10(j) relief appropriately fosters employee free choice where the processing of a representation petition is blocked by serious unfair labor practices but the petitioner would be willing to proceed to an election under the protection of a court-ordered injunction. Recently, I requested that the Board authorize Section 10(j) relief in a case where an employer discriminatorily laid off and refused to rehire employees and the union indicated that, if the court granted a Section 10(j) injunction, it would file a request to proceed to an election. Where employers assist and recognize unions that represent only a minority of unit employees, Section 10(j) injunctions that order the parties to sever that relationship permit employees to freely select whether or not they want union representation. Similar considerations of protecting employee free choice are also present in serious cases of union picket line violence.

An interim bargaining order may be necessary to protect the Board's ultimate remedy. For example, when a successor employer unlawfully refuses to recognize a union that represented its employees under the predecessor, an interim bargaining order preserves the employees' choice of representation. In addition, when a successor employer makes unilateral changes after commencing operations, an interim bargaining order limits the potential burden of a Board restoration order that could appear punitive. Further, where a recidivist respondent is engaged in a repeated pattern of unfair labor practices, the violations are likely to erode employee Section 7 rights over time and may warrant Section 10(j) relief.

Concerning the "success on the merits" factor, the allegations of the complaint must be sufficiently strong that the Board likely will enter the final relief sought on a temporary basis through the Section 10(j) proceeding. The clarity of the

alleged violations is an important factor in the 10(j) determination because interim equitable relief should be imposed on respondents only when it is likely that the Board will impose such relief permanently.

Finally, I believe that regions should continue to use the expedited hearing procedures outlined in GC Memorandum 94-17, particularly in cases where the charged party has refused to cooperate in the investigation and the region believes that it will raise a substantial defense at the administrative hearing. In those cases, the regions should reevaluate the need for Section 10(j) relief immediately after the close of the hearing, and seek Section 10(j) authority if it is still warranted. The regions also may reassess whether to seek Section 10(j) authority in close Section 10(j) cases where a favorable decision of the administrative law judge issues promptly after the hearing closes and the passage of time has not defeated the need for interim relief or the ability to restore the status quo.

In sum, where an interim injunction will restore employee statutory rights, facilitate the prompt holding of a fair election, or retain collective bargaining rights, Section 10(j) proceedings may be appropriate. Therefore, the regional offices should carefully investigate the impact of unfair labor practices on employee statutory rights, evaluate whether cases warrant Section 10(j) relief, and promptly submit those cases they believe are appropriate to the Injunction Litigation Branch in the Division of Advice.

/s/
A.F.R.